85-220

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HON. MARVIN E. CHERNER, Judge of the Tenth Judicial Circuit of Alabama,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER AN ACTION IN STATE COURT TO SET ASIDE JUDGMENT RENDERED IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE IS TRIABLE BY JURY.

PARTIES TO THE PROCEEDING

Parties:

Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth

Burlington Northern Railroad Company

Judge Marvin E. Cherner, sitting as Judge of the Tenth Judicial Circuit of Alabama

Affiliated or related parties:

The parent company to Burlington Northern Railroad Company is Burlington Northern, Inc., which owns all the stock in the Burlington Northern Railroad Company. The following companies are affiliated with the Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
The Camas-Prairie Railroad Company
Davenport, Rock Island & Northwestern Railway Company
Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt and Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal Transfer Railway Company

Longview Switching Company
Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Pueblo Terminal Union Depot and Railroad Company
St. Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Wichita Union Terminal Railway Company
Winona Bridge Company

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OPINIONS BELOW

The opinion of the Alabama Supreme Court denying the petition for mandamus with respect to the claimed right to a jury trial is reported at 19 ABR 577 (1985) and is attached hereto as Appendix A. The ruling of the trial court denying the motion to quash the demand for jury trial is attached hereto as Appendix D.

JURISDICTION

The judgment of the Alabama Supreme Court denying the petition for mandamus to respondent was entered on January 4, 1985, affirming respondent's order dated June 15, 1985. On

January 18, 1985 petitioner filed a timely petition for rehearing. Appendix B. The Alabama Supreme Court denied the petition for rehearing on May 10, 1985. Appendix C. Petitioner has ninety days to file its Petition for Certiorari with this Court. 28 U.S.C. § 2101(c). Therefore this Petition is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). The question presented involves the validity of procedures under state law with respect to state judgments inasmuch as they are claimed to be repugnant to federal law under the FELA.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> The congress shall have power . . . (T)o regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

United States Constitution, Article I, Section 8, Clause 3.

* * * * * *

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

United States Constitution, Amendment IV, Section 1.

* * * * * *

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations,

shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 51.

* * * * * *

Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of

contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53

* * * * * *

Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 55.

* * * * * *

Actions; limitations; concurrent jurisdiction of courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56.

* * * * * *

Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

28 U.S.C. § 1445(a)

* * * * *

STATEMENT OF THE CASE

Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth, brought suit on November 12, 1981, in the Tenth Judicial Circuit Court of Alabama against St. Louis-San Francisco Railway Company, Burlington Northern Railroad Company ("Petitioner") and another defendant under the Federal Employers' Liability Act, 45 U.S.C. § 51, (hereinafter "FELA") to recover damages for the death of her decedent husband, James B. Duckworth, who had been killed while working as a trackman for the petitioner railway company. (Appendix G). The plaintiff alleged that she had previously entered into a consent judgment on January 2, 1980, in another action in a state court of Alabama in the amount of $151,500 which judgment was satisfied. She claimed, however, that the judgment was obtained by fraud, and it was due to be set aside. The plaintiff demanded a jury trial.

The petitioner filed a motion to strike the jury demand on the ground that the plaintiff was not entitled to a jury trial in an equitable action to set aside a final judgment. Judge Marvin Cherner ("Respondent") denied the motion to strike the jury demand. (Appendix D).

The petitioner filed a petition for mandamus with the Supreme Court of Alabama, but that Court denied the petition, with three justices dissenting. (Appendix A). The majority opinion in the Alabama Supreme Court acknowledged that it is settled under Alabama law that an independent action brought to set aside or vacate a judgment procured by fraud, accident or mistake is an action in equity. Thus, the motion to strike was due to be granted; but the majority believed that it was compelled by decisions of this Court, particularly *Dice v. Akron, Canton & Youngstown Railroad Company,* 342 U.S. 359 (1952), to deny the mandamus and allowed the denial of the motion to strike to stand.

After rehearing was denied (Appendix C), Petitioner filed this Petition for Certiorari.

The jury trial question was first raised in the trial court by means of a motion to strike which alleged that "Plaintiff is not entitled to a jury in this equity action to set aside a judgment." In a brief filed pursuant to the motion, the federal issues were raised. (Appendix F). The respondent denied the motion.

The matter was brought before the Supreme Court of Alabama on Petition for Mandamus (Appendix E) and the petition was denied on the merits. The issue of the jury trial was raised at all levels of the State courts.

Petitioner now prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court.

REASONS FOR GRANTING THE WRIT

Alabama practice and procedure with respect to reopening final judgments is governed by Alabama Rule of Civil Procedure 60(b) which is almost identical to the Federal Rule of the same number. That rule recognizes that, as a general rule, final judgments over four months old can be set aside only by means of the independent action on grounds of fraud, accident or mistake. The case law of the state firmly establishes that the independent action is equitable in nature and thus is not accompanied by a right to a jury trial. The Alabama Supreme Court recognized the efficacy of that well-established procedure and made no effort to alter or amend it with respect to state court judgments. The majority of the court in this case held however that the FELA requires that a state court provide a jury trial for actions to set aside judgments rendered in FELA actions. To reach this result, the majority extended the holding in *Dice v. Akron, Canton Youngstown Railroad Company,* 342 U.S. 359 (1952). *Dice* held that a state court must provide a jury trial to determine the validity of a contractual release raised as a defense to an FELA claim. The court analogized a consent judgment to a release and, as a result, overextended the application of *Dice.* Petitioner maintains that the *Dice* case was improperly applied. If, in fact, *Dice* is correctly construed as having decided the question of validity of judgments, petitioner submits that the case is due to be overruled or limited to its facts.

The majority in *Dice* held that the question of a jury trial on the issue of validity of a contractual release invoked federal rather than state law and that federal law requires a jury trial. It is submitted that, assuming federal law is controlling, a jury trial would not be required in the instant case. Moreover, we contend that state rather than federal law should be applied.

1. Federal law does not require a jury trial.

In *Dice* the Ohio procedure for setting aside releases was equitable and non-jury, but FELA was engrafted as an excep-

tion. *Dice* thus was a departure from the principle set forth in earlier cases which affirmed that FELA cases were not entitled to special treatment in the state courts on matters of procedure. For instance, if jury trials are not afforded in tort cases generally, there would not be a separate and different rule in FELA cases. This Court observed in *Second Employers' Liability Cases,* 223 U.S. 1, 56 (1911) "that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or affect their modes of procedure . . ." The above-quoted principle was reinforced in *Minneapolis & St. Louis Railroad Company v. Bombolis,* 241 U.S. 211 (1916) which validated a less than unanimous verdict in a state court, even though non-unanimous verdicts were not in accordance with the Seventh Amendment. Noting the duty of state courts to enforce federal rights in trial courts, Chief Justice White concluded that "it was within the scope of trial authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Id.* at 223.

The Alabama Supreme Court readily admitted that to allow consent judgments to be set aside by jury trials gives the FELA action a unique position in both federal and state jurisprudence. To accord such a status to FELA cases would require at a minimum a congressional intent to require juries in this setting, but this Court has relied principally upon the general federal jurisprudence rather than any particular construction of FELA.

In *Bailey v. Central Vermont Railway,* 319 U.S. 350 (1943), this Court held that the motion for directed verdict under the set of facts before it should not have been granted. In that case, Justice Douglas relied upon federal jurisprudence and its historical significance in determining the right to a jury trial in FELA cases.

> The rights which the Act creates are federal rights protected by federal rather than local rules of law. . . . *And*

> *those federal rules have been largely fashioned from the common law.* (Emphasis added). *Id.* at 352.

Although the Court in *Dice* did not articulate the source of the rule of law with precision, Justice Black quoted *Bailey, supra,* to the effect that the jury trial was basic to our "federal jurisprudence."

Now, the Alabama Supreme Court has extended *Dice* so that FELA cases are not only separated from other tort cases under the state law, but they also enjoy a special place among federally tried cases. It has been established that federal common law recognizes that actions to set aside a judgment procured by fraud are equitable. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238 (1944), Justice Black, the author of the majority opinion in *Dice,* stated with respect to an attempt to set aside a judgment in a patent case:

> Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. . . . This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently

> gross to demand a departure from rigid adherence to the term rule. *Id.* at 244.[1]

The universality of these principles has been recognized through the codification of Rule 60(b) of the Federal Rules of Civil Procedure which provides for relief from judgment by motion and also retains an independent action for such relief. As stated in one treatise:

> This is not an affirmative grant of power but merely allows continuation of whatever power the court would have had to entertain an independent action if the rule had not been adopted. The saving clause preserves the power as it was defined by 'established doctrine.' The reference to 'independent action' in the savings clause is to what has been historically known simply as an independent action in equity to obtain relief from a judgment. 11 Wright and Miller, *Federal Practice and Procedure* § 2868 (1973).

The equitable application of Rule 60(b) has been applied in federal cases regardless of whether federal substantive rights are involved. E.g. *Bankers Mortgage Co. v. United States,* 423 F.2d 73 (5th Cir. 1970) *cert. denied,* 399 U.S. 927 (1970), (action to set aside judgment in tax dispute); *Bizzell v. Hemingway,* 548 F.2d 505 (4th Cir. 1977) (action to set aside bankruptcy confirmation). See also *Chrysler Corp. v. Superior Dodge, Inc.,* 83 F.R.D. 179 (D. Md. 1979). A thorough survey of the case law dealing with reopening judgments as was embodied in Rule

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[1] Compare *Hazel-Atlas Glass Co.* with *Radio Corp. of Am. v. Raytheon Mfg. Co.,* 296 U.S. 459 (1935). In that case, the Court held that the question of the validity of a release (such as was the issue involved in *Dice*) is an issue at law and affirmed a lower court ruling removing the determination from the equity courts. While noting that equitable issues would govern the avoidance of a relief in certain circumstances, the Court held that when a plaintiff chose to oppose a release at law, a legal remedy was available. Therefore, the matter would be determined in the same proceeding as the other issues.

60(b) may be found in Moore & Rogers, *Federal Relief from Civil Judgments,* 55 YALE L. J. 623 (1946).

Factually *Dice* deals with an action to set aside a release while the instant case involves a state court judgment. Professor Moore clearly highlights the distinguishing characteristics of consent judgments and releases as follows:

> There are judicial pronouncements . . . to the effect that a consent or related type of judgment does not have res judicata effect, but gets its binding force and effect from the parties' consent and is in the nature of a contract. These statements are not supportable. The consent judgment may raise special problems in connection with other matters, such as splitting an action and collateral estoppel. But the fact remains that the judgment is not an *inter partes* contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication. 1 B, *Moore's Federal Practice* ¶ 0.409[5](1984).

Consent judgments are distinguishable from releases both in terms of the manner they are created and in their legal effect. The interposition of judicial action makes the court issuing the judgment a participant in the process. Once judgment is issued, the principles of res judicata are invoked. The judgment is entitled to Full Faith and Credit in other states under Article IV, Section 1 of the United States Constitution. The historic practice of honoring the finality of judgments has been compromised by the decision of the Alabama Supreme Court. *Dice* was not concerned with such considerations. it is hard to believe that the razor-thin majority which decided *Dice* was prepared to extend its holding in the manner that the majority of the Alabama Supreme Court has now done.

2. A more appropriate rule would be to defer to state law.

Justice Black based the opinion on a determination that the right to trial by jury is too basic to the system under the FELA to be classified as a mere "local rule of procedure." *Id.*, at 363. The limits of that principle are not apparent. There is only one reference to a jury in the statute (45 U.S.C. § 53) and the specific references in the FELA to the concurrent jurisdiction of state and federal courts has led this Court to conclude that equality of treatment between FELA matters and other tort cases in the state court is the limit of Congressional intent. E.g. *Minneapolis & St. Louis Railroad Company v. Bombolis, supra; Second Employers Liability Cases, supra.*

Bombolis provides stronger precedent for the issue raised in this case than *Dice.* In *Dice,* the Ohio courts had held that the issues of fraud attendant to the attack of a release were "split into fragments, some to be determined by the judge, others by the jury." *Id.*, at 363. The Supreme Court noted a distinct difference between *Bombolis* which held that an FELA claim could be decided by a non-unanimous verdict when brought in state court and the Ohio procedure which provided that issues of fraud *raised within the same action* were triable by differenct fact-finders. The Court reversed the Ohio practice but noted that *Bombolis* "might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the Act." *Dice,* at 363.

Alabama has abolished trial by jury in all independent actions to set aside judgment whether by trial or consent. *Battle v. Morris,* 265 Ala. 581, 93 So. 2d 428 (1957). Under Alabama procedure, no other action can be taken with respect to the underlying cause of action until the judgment is set aside; that is, negligence issues cannot be reached unless and until the judgment is set aside. The independent action to set aside judgment is separate from the negligence action unlike the instance when a

release is brought as a defense. And since Alabama provides no jury trial for the independent action in any instance, the FELA does not require it under *Bombolis,* even according to *Dice.*[2]

As stated in Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 508 (1954):

> The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. . . . Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered. If the differences become so conspicuous as to affect advance calculations of outcome, and so to induce an undesirable shopping between forums, the remedy does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure, of a federal forum equally accessible to both litigants.

This reasoning is fortified by the FELA statute itself. Congress expressly recognized the concurrent jurisdiction of state courts and permitted the plaintiff's choice of a state, as opposed to federal, court to be preserved by exempting FELA action from removal to the federal court. 45 U.S.C. § 56, 28 U.S.C. § 1445(a). Implicit in the statutes is a Congressional perception that there is some non-uniformity between state and federal courts, and the plaintiff has the option to exploit whatever procedural differences there may be by choosing the most advantageous forum. It follows that Congressional intent supports a conclusion that the parties take the court as they find it from a procedural point of view.

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[2] The foregoing reasoning is the logic adopted by the California courts. See *Garcia v. Southern Pac. Trans. Co.,* ____ U.S.L.W. ____, App. B (U.S. July 30, 1985) (No. _____).

In any action in a state court which invokes federal law, some line must be drawn where the extension of congressional will ends and the autonomy of the local court remains. The most appropriate line lies between substance and procedure. This distinction has received considerable support in the lower courts. *Mills v. Pennsylvania New York Central Transportation Company,* 16 Ohio St.2d 704, 243 N.E.2d 99 (1968); *Midland Valley Railroad Company v. Manios,* 307 P.2d 545 (Okla. 1957); *Rivera v. Atchison, Topeka & Santa Fe Railway Company,* 61 N.M. 314, 299 P.2d 1090 (1956); *Saint Louis-San Francisco Railway Company v. King,* 278 P.2d 845 (Okla. 1954); *McGuigan v. Southern Pacific Company,* 112 C.A.2d 104, 247 P.2d 415 (1952); *Roy v. Oregon Short Line Railroad Company, 55 Idaho 404, 42 P.2d 476 (1935); Ecclesine v. Great Northern Railway Company,* 58 Mont. 470, 194 P. 143 (1920).

That line is in accord with the provisions of the FELA, which purports to deal only with questions of substantive rights. Any case applying federal law in a state court venue necessarily involves the joint exercise of federal power (through the application of federal law) and state power (through the process of the local court). Indisputably, local court autonomy is not totally destroyed merely because federal substantive law is applied. Therefore, there must be some allocation of the sources of such power. The line between substance and procedure corresponds most comfortably with the nature of the governmental function being exercised by the respective jurisdictions.

The fact situation in this case is a compelling example of the need to draw a line. It is hard to conceive of a more fundamental exercise of sovereignty than by the rendition of a judgment. We submit that any attempt by Congres to alter or regulate the effect of state judgments cannot be lightly inferred, and there is no reason for finding such an intent here.

3. The question is important.

The significance of the issue to the Railroad industry is best revealed by statistical data reflecting the number of FELA claims processed each year. In 1984 alone, 3,047 FELA claims were resolved through litigation while an even more overwhelming 43,770 were settled out of court.[3] Similar statistics for 1983 and 1982 are equally astonishing. (1983, 2,897 resolved through litigation, 37,770 out of court; 1982, 2,403 by litigation, 49,307 out of court). Suffice it to say that the procedures for properly resolving claims brought under the FELA are of extraordinary importance to the railroad industry.

At issue is the heart of the settlement process under the Employers' Liability Act. Moreover, the availability of a jury trial to decide whether to set aside a consent judgment is integrally tied to the questions of finality. As a practical matter, a jury trial inevitably involves the litigation of mixed questions of alleged fraud in obtaining a judgment and the merits of the underlying case. On the other hand, the independent action to set aside a judgment in equity, tried by the judge, focuses solely on the claimed fraud. Petitioner submits that the long-standing practice of setting aside judgments in equity on limited grounds serves the twin purposes of assuring finality and reopening only those exeptional cases where fraud, accident or mistake is demonstrated. The Alabama Supreme Court has ruled that even the judicial approval of a settlement agreement does not protect the claim from review at a later date by a jury. Given the enormous number of claims disposed of each year, this decision should be carefully reviewed.

4. There is a conflict among the states.

The Alabama and California courts have reached conflicting results when asked to apply *Dice* to other fact situations. In

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[3] American Association of Railroads

the opinion below, Alabama has held that *Dice* required that all issues attendant to FELA claims are to be tried by a jury, federal and state practice notwithstanding. California, on the other hand, limited *Dice* to its facts in determining that a state need not afford a jury trial to an FELA litigant. *Garcia v. Southern Pac. Transp.*, petition for cert. filed, ____ U.S.L.W. ____, Appendix B. (U.S. July ____, 1985) (No. 85-161). Because of this conflict, we respectfully request that the Supreme Court accept certiorari.

CONCLUSION

We have not researched every case attacking a final judgment on grounds of fraud. However, to the extent we can ascertain, Mrs. Warren is the first plaintiff in a reported case who has been accorded a right to a jury trial in her independent action to set aside a judgment. A majority of the Supreme Court of Alabama found that Congress intended this radical alteration of procedure when it enacted the Federal Employers' Liability Act.

We respectfully disagree.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE STATE OF ALABAMA — — — — — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

Ex parte: Burlington Northern Railroad Company

Petition for Writ of Mandamus

83-1159

(In Re: Nettie Faye Duckworth Warren, etc.

v.

Burlington Northern Railroad Company, etc., et al.)

ADAMS, JUSTICE.

Petitioner Burlington Northern Railroad Company (hereinafter Burlington) seeks a writ of mandamus from this Court requiring the Honorable Marvin E. Cherner, Circuit Judge of Jefferson County, to grant Burlington's motion to strike the plaintiff's jury demand in a pending action against the railroad. We deny the writ.

The petition for mandamus arises from the case of *Nettie Faye Duckworth Warren v. Burlington Northern Railroad Company,* now pending in the Circuit Court of Jefferson County. Mrs. Warren, the administratrix of the estate of her deceased husband, James B. Duckworth, filed suit against petitioner Burlington, as well as Kershaw Manufacturing Company (hereinafter Kershaw). She alleges that her deceased husband was a laborer for Burlington and was killed on the job due to the negligence of the railroad. This claim is governed by the Federal Employer's Liability Act, 45 U.S.C. § 51, et seq. (FELA).

Mrs. Warren claims against Kershaw that it is liable for the negligent manufacture of certain equipment involved in her husband's death. She pursues this claim under the Alabama Extended Manufacturer's Liability Doctrine.

In addition to these allegations, the plaintiff asserts that a judgment was previously entered in her favor for $151,500.00 in the case of *Nettie Faye Duckworth v. St. Louis-San Francisco Railway Company and Kershaw Manufacturing,* a case based on the same causes of action.[1] Mrs. Warren claims that this judgment was procured through fraud, however, and is therefore null and void.

According to the plaintiff's amended complaint, the fraud occurred when Burlington's claims agent convinced Mrs. Warren to settle for less than she was entitled to by representing that she did not need a lawyer because, as Burlington's agent, he would handle her claim. She says that the agent did not explain the liability of Burlington under the FELA and did not mention the various elements of damages recoverable under the FELA; that the agent stated that $151,500.00 was all that she could recover from the railroad; and that she agreed to accept that amount, a complaint was filed, and the consent judgment was entered.

In Mrs. Warren's present action against Burlington, the railroad filed a motion to dismiss for failure to plead fraud with particularity. This motion was granted and Mrs. Warren subsequently amended her complaint. Burlington then filed a motion to transfer the suit to the "Equity Division" of the Jefferson Circuit Court on the grounds that an independent suit to set aside an earlier judgment is an equitable action. This motion

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[1] This case was filed in the Circuit Court of Walker County, CV-80-02. The St. Louis-San Francisco Railway Company no longer exists. Burlington Northern Railroad Company is its successor corporation.

was also granted. Burlington then filed a motion to strike plaintiff's jury demand on the grounds that there is no right to a jury trial in a court of equity. The case was transferred back to the "Civil Division," where Judge Cherner denied this motion to strike. Burlington now petitions for a writ of mandamus to require Judge Cherner to strike the plaintiff's jury demand.

The issue in this case is whether the Federal Employer's Liability Act requires a jury trial on the question of whether an earlier consent judgment was procured by fraud, notwithstanding the fact that an independent action to set aside a judgment is normally an equitable proceeding heard by the court. We hold that a jury trial is required under these circumstances.

This case presents a conflict between a federal statutory remedy and traditional Alabama equity law. It is settled in this state that an independent action brought to set aside or vacate a judgment procured by fraud, accident, or mistake is an action in equity. *Maddox v. Hunt,* 281 Ala. 335, 202 So. 2d 543 (1967). There is no right to a jury trial in such actions. *Ex parte Jones,* 447 So. 2d 709 (Ala. 1984). Burlington argues that under these principles, Mrs. Warren's claim that her consent judgment was procured by fraud is equitable in nature and thus should be decided by the court rather than a jury.

In this case, however, the plaintiff is suing under a federal statute and not Alabama law. This distinction represents a crucial factor in our decision to deny Burlington's writ. If Mrs. Warren's claim involved state law, the validity of the earlier consent judgment would be determined in the traditional fashion by the court sitting in equity. The fact that this is an FELA case requires a different result; a jury must decide whether there was fraud.

The Federal Employer's Liability Act, 45 U.S.C. § 51, et seq., establishes a uniform national body of law to govern railroad workers' claims against their employers. *Second Employer's Liability Cases,* 223 U.S. 1 (1912). Thus it has been held that

federal law and not state law will control in FELA actions. *Chesapeake & Ohio R. Co. v. Kuhn,* 284 U.S. 44 (1931). This is a necessary conclusion if uniformity is to be achieved, considering the fact that state and federal courts have concurrent jurisdiction to entertain FELA suits. 45 U.S.C. § 56.

The FELA does not expressly require a jury trial for the claims brought thereunder. Further, the Seventh Amendment, U.S. Const., does not require state courts hearing FELA claims to provide jury trials in those suits. *Minneapolis & St. Louis Railroad Company v. Bombolis,* 241 U.S. 211 (1916). If a state provides a jury trial in a common law negligence action, however, it must provide a jury trial in an FELA negligence action. *Dice v. Akron, Canton & Youngstown Railroad Company,* 342 U.S. 359 (1952). Thus, in Alabama, Mrs. Warren is guaranteed a jury trial in her FELA action against Burlington.

The question remains as to whether the state, having recognized the FELA cause of action and the right to a jury trial therein, can deny the right to a jury finding on a crucial issue raised in the litigation, in this case the validity of the prior consent judgment. The United States Supreme Court decision in *Dice v. Akron, Canton & Youngstown R. Co., supra,* is dispositive of this issue.

Dice is analogous to the present situation, because in that case, the defendant railroad asserted as a defense that plaintiff Dice had signed a document releasing the railroad of its liability in exchange for a cash settlement. Dice claimed that the release was void, however, because it was obtained by fraud. A jury found for the plaintiff, but the trial court entered a JNOV in favor of the railroad after "reappraising" the evidence as to fraud. The Supreme Court of Ohio sustained the trial court's action, holding that under controlling Ohio law, factual issues in regard to fraud in the execution of such a release were properly determined by the court and not the jury.

The United States Supreme Court reversed the Ohio Supreme Court's holding. Justice Black, writing for the majority,

criticized Ohio for providing the usual jury trial of factual issues relating to negligence, but nevertheless permitting the judge to resolve the question of fraud in the release. The Court noted that Ohio could lawfully remove the right to a jury trial in an FELA case only by abolishing trial by jury in all negligence cases, whether arising under common law or under the federal Act. The Court went on to say the following:

> But Ohio has not done this. It has provided jury trials for cases arising under the federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury.

342 U.S. at 363. Ohio's practice was therefore improper in an FELA action.

The *Dice* decision went on to emphasize the importance of the jury trial in FELA litigation:

> We have previously held that "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence' " and that it is "part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence "is to take away a goodly portion of the relief which Congress has afforded them." *It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio has here used. Brown v. Western R. Co.*, 338 U.S. 294. [Emphasis added.]

342 U.S. at 363.

Burlington's argument that the issue of fraud in Mrs. Warren's consent judgment should be determined by a judge rather

than a jury is directly contrary to the holding in *Dice*. Alabama's equity practice is no more sacred than that of Ohio, and will justify the denial of a jury trial no more than Ohio's equity practice did in *Dice*.

Petitioner argues that *Dice* applied only to a release and not to a consent judgment such as that involved here. Admittedly, there is a difference between the two devices. What is important here, however, is that both releases and consent judgments would be attacked in equity proceedings under Alabama law. *Dice* would require a jury for such an attack on a release in an FELA case. A consent judgment would, therefore, be handled in the same way.

Judge Cherner's pre-trial order, which denied Burlington's motion to strike the jury demand, reaches this conclusion:

> In both *Dice* and the present case, the F.E.L.A. claimant has asserted a claim which is equitable in nature; in *Dice,* the plaintiff was seeking to cancel a release as having been secured by fraud. In the present case, the F.E.L.A. claimant is seeking to cancel a consent judgment as having been obtained by fraud. In both cases, the claimant would not be entitled to a jury trial under state law to decide such issues. However, under *Dice,* the F.E.L.A. claimant is guaranteed the trial by jury for such issues as a substantive right. Under *Dice,* Nettie Faye Warren is entitled to a jury trial on the issue whether the consent judgment was obtained by fraud.

We agree with this perceptive and concise analysis.

Under the guidance of the United States Supreme Court decision in *Dice,* we conclude that Judge Cherner was correct in denying Burlington's motion to strike Mrs. Warren's jury demand. We therefore deny the petition for a writ of mandamus.

WRIT DENIED.

Maddox, Faulkner, Jones, Shores and Beatty, JJ., concur.

Torbert, C. J., Almon and Embry, JJ., dissent.

TORBERT, CHIEF JUSTICE (dissenting).

I dissent because I believe the issue in *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952), was decided incorrectly and even if it was correctly decided this case is distinguishable. Prior to *Dice*, the Supreme Court had said that states, in entertaining actions under the Federal Employer's Liability Act (FELA), had to provide a jury trial only if they provided for jury trials in local negligence actions. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916); see also *Dice, supra* (Frankfurter, J., dissenting). Because Ohio had always treated an attack on a release as an equitable action, not triable by jury, an action under the FELA attacking the validity of the release should have been found to be an equitable action, not triable by jury.

In *Dice*, the Court referred to *Bombolis* and said it might be applicable if Ohio had abolished jury trials in all negligence actions. However, the Court then turned around and stated that the right to a jury trial in FELA actions tried in state courts was not derived from the manner in which states handled local negligence actions:

> "We have previously held that 'The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence and that it is 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.' " ' *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded

> them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. *Brown v. Western R. Co.*, 338 U.S. 294.
>
> "The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor."

Dice at 363. The clear implication of this is that federal common law requires that jury trials be provided in FELA actions.

If federal law controls, then the question arises as to whether under federal law an attack on the validity of a consent judgment is equitable or legal in nature. First, there is a significant difference between consent judgments and releases:

> "There are judicial pronouncements ... to the effect that a consent or related type of judgment does not have res judicata effect, but gets its binding force and effect from the parties' consent and is in the nature of a contract. These statements are not supportable. The consent judgment may raise special problems in connection with other matters, such as splitting an action and collateral estoppel. But the fact remains that the judgment is not an *inter partes* contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication."

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶0.409 [5] (1982). An action to set aside a judgment invokes the equitable power of the court. *Hazel-Altas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). However, the question of the validity of the release, while it can be an equitable issue, can also be an issue at law. *Radio Corp. of America v. Raytheon Manufacturing Co.*, 296 U.S. 459 (1935).

Therefore, assuming *Dice* is correct and that federal law controls as to whether the consent judgment was procured through fraud, federal law recognizes that an attack on a judgment is equitable in nature and therefore not triable by jury.

Almon and Embry, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

Case No. 83-1159

Ex parte: Burlington Northern Railroad Company,

(In Re: Nettie Faye Duckworth Warren, etc.

v.

Burlington Northern Railroad Company, etc., et al.

APPLICATION FOR REHEARING

Comes now Burlington Northern Railroad Company (hereinafter "Burlington") and petitions this Court to grant it an application for rehearing. A rehearing is necessary to rectify the omissions and analytical errors of the original opinion.

1. The Court failed to properly apply principles of res judicata in this case. The entry of the judgment extinguished the FELA action; the plaintiff's only remaining remedy was the independent action in equity to set aside the judgment. FELA rules therefore should not have been applied.

2. Burlington's right to equal protection of the law was violated in that it was denied the usual expectations of repose extended to other defendants against whom judgments have been entered.

3. Even if this case is characterized as an FELA claim, the Court has overextended the *Dice* opinion. This Court determined that the import of *Dice* is that all traditionally equitable proceedings incidental to an FELA claim are to be tried by a jury. This is simply incorrect. The holding of *Dice* is that the federal procedural rule will prevail when it conflicts with a local rule. *Dice* does not require a jury trial when the usual federal rule does not.

4. Assuming *arguendo* that federal law provides for a jury trial to set aside a prior final judgment, it is unconstitutional for this rule to be applied to the state court proceedings. Any effort by Congress to usurp the authority of state court judgments through the FELA is prevented by the constitutional doctrines controlling the relationship between federal and state power, now held to be rooted in the Tenth Amendment. Congress knew this and the United States Supreme Court knew this. Only Alabama has ignored these principles. The failure of this Court to address the 10th amendment issue when four of the nine justices in *Dice* stated that the federal legislature did not even have power to regulate the procedure governing the setting aside of a mere release is adequate grounds for granting this application.

Due to the foregoing reasons, this Court must reconsider its decision and grant the application for rehearing.

Respectfully submitted,

L. Vastine Stabler

Kenneth D. Davis

Attorneys for Burlington
Northern Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Application for Rehearing has been duly served on Mr. Frank O. Burge, Jr., BURGE, FLORIE, POWELL & WETTERMARK, P.C., 1230 First Alabama Bank Building, Birmingham, Alabama 35203-3269, by hand-delivering, this 18th day of January, 1985.

Kenneth D. Davis
OF COUNSEL

APPENDIX C

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-1159
EX PARTE: BURLINGTON NORTHERN RAILROAD COMPANY
PETITION FOR WRIT OF MANDAMUS
(Re: Nettie Faye Duckworth Warren, etc.
Appellant
v.
Burlington Northern Railroad Co., etc., et al.)
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell _____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.
XXXXX Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

5/10/85
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA

Civil Action No. CV-81-4859

Nettie Faye Duckworth Warren, as Administratrix of the Estate of James B. Duckworth, who sues on her own behalf as the dependent surviving widow of James B. Duckworth and who also sues on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth and Danny Duckworth, the dependent minor children of James B. Duckworth, deceased,
Plaintiff,

v.

Burlington Northern Railroad Company, a corporation (successor corporation to St. Louis, San Francisco Railway Company, a corporation); and Kershaw Manufacturing Company, Inc., a corporation,
Defendants.

PRETRIAL ORDER

1. *Counsel.* Counsel for the plaintiff, Nettie Faye Duckworth Warren, are Frank O. Burge and Scott A. Powell. Counsel for the defendant, Burlington Northern Railway Company (suc-

cessor to St. Louis - San Francisco Railway Company), is Vastine Stabler. Counsel for the defendant, Kershaw Manufacturing Company, Inc., a corporation, is Jack J. Hall.

2. *Parties.* Plaintiff is Nettie Faye Duckworth Warren who sues on her own behalf as the dependent surviving widow of James B. Duckworth, deceased, and who also sues on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth and Danny Duckworth, as the dependent minor children of James B. Duckworth, deceased. (For convenience, this plaintiff will be referred to as "Nettie Faye Warren" or "Warren"). Defendants are Burlington Northern Railway Company, a corporation ("Burlington"), and Kershaw Manufacturing Company, Inc., a corporation ("Kershaw").

3. *Pleadings.* The following pleadings have been allowed:

A. Complaint and amended complaint on behalf of Nettie Faye Warren.

B. Answer and amended answer by Kershaw. Burlington has not filed an answer and is hereby directed to file an answer in accordance with the provisions of Rule 8(b) of the Alabama Rules of Civil Procedure within twenty days from the date of this order.

4. *Prior Motions.* The following motions were heard and disposed of as hereinafter indicated:

A. Motion by Burlington to transfer to the Equity Division was granted.

B. Motion by Kershaw to transfer to the Equity Division was granted.

By order entered October 28, 1983, this case was remanded and re-transfered to the Civil Division for futher proceedings and specially assigned to this Court.

5. *Pending Motions.* The following motions are now pending and the following action is taken with respect to such motions:

A. Motion by Burlington to dismiss.

In support of its motion, Burlington has submitted a copy of a final judgment rendered in the Circuit Court of Walker County, Alabama, CA# CV-80-02 on January 2, 1980 awarding Nettie Faye Warren the sum of $111,500 against Burlington and the sum of $40,000 against Kershaw.

In the first amendment to her complaint, Nettie Faye Warren asserts that she was induced to agree to the judgment entered in her favor from the Circuit Court of Walker County, Alabama by representations made to her by the defendants upon which she relied to her detriment and that the representations were false. Nettie Faye Warren therefore seeks to vacate and set aside the judgment as being obtained as result of the frauds practiced on her by Burlington.

Since Nettie Faye Warren has challenged the judgment by the allegations of her complaint, the complaint may not be dismissed. Accordingly, the motion to dismiss filed by Burlington is hereby overruled.

B. Motions by Burlington and Kershaw to strike jury demand.

In the first amendment to her complaint, Nettie Faye Warren alleges that the judgment rendered in her favor and against Burlington and Kershaw by the Circuit Court of Walker County, Alabama in Civil Action CV-80-02, was obtained by fraud. She seeks now in an independent action in this Court to set aside the judgment. Rule 60(b) of the Alabama Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... this rule does not limit the power of a

> court to entertain an independent action within a reasonable time and not to exceed three years after the entry of the judgment ... to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court...

In Alabama, an independent action brought to set aside or vacate a judgment procurred by fraud, accident or mistake, is in the nature of an equitable remedy. In *Maddox v. Hunt,* 281 Ala. 335, 202 So.2d 543 (1967), an independent action had been brought by the plaintiff seeking to set aside a judgment obtained by default. Speaking to the general principles involved and to the nature of the remedy, the Supreme Court of Alabama stated in its opinion the following:

> Courts of equity will set aside and vacate judgments procurred by fraud, accident, or mistake, and without negligence on the part of the complainant, if the complainant has a meritorious defense. *Barrow v. Lindsey,* 230 Ala. 45, 159 So. 232; *St. John v. Campbell,* 250 Ala. 380, 34 So.2d 584.
>
> However, as stated in *Hendley v. Chabert, et al.,* 189 Ala. 258, 65 So. 993, this equitable power to set aside a judgment of another court is of great strictness, otherwise equity courts would supplant the jurisdiction of all other courts. A due regard for the interests of society requires strictness and caution in the exercise of the power of equity to set aside judgments.

Where the plaintiff's claim is equitable in nature, there is no right to a jury trial. It is true that Rule 38(a) of the Alabama Rules of Civil Procedure states that the right of trial by jury is declared by the Constitution of Alabama shall be preserved to the parties inviolate. However, this rule only means that the right to jury trial is preserved as it was known in Alabama before the adoption of the Alabama Rules of Civil Procedure. The Committee Comments to Rule 38(a) make this clear:

> Subdivision (a) is identical with Constitution 1901, ¶11, and thus preserves the right to jury trial precisely as it has been known heretofore in Alabama. See generally, Jones, Trial by Jury in Alabama, 8 Ala. L. Rev. 274 (1956). Because law and equity are now to be merged, there will be cases in which issues to be tried to the jury are combined with issues to be tried to the court. But the basic test is clear: If an issue is of a sort which heretofore would have been tried to a jury, then the party has a Constitutional right, expressly reaffirmed by Rule 38(a), to have it tried to a jury under the merged procedure...

The Supreme Court of Alabama has continued to construe Rule 38(a) as only giving the right to jury trial in those cases where such right existed prior to the adoption of the Alabama Rules of Civil Procedure. For example, actions seeking the cancellation or reformation of a written instrument are considered to be equitable in nature so that the parties are not entitled to a jury trial. See, E.g., *Richey v. Creel,* 437 So.2d 554 (Ala. 1983); *Johnson v. Brown,* 437 So.2d 1273 (Ala. 1983); *Holloway v. Nationwide Mut. Ins. Co.,* 376 So.2d 690 (Ala. 1979).

If Nettie Faye Warren's action seeking to set aside the judgment previously entered by the Circuit Court of Walker County involved state law, she would not be entitled to a jury trial. However, her claim is brought under the Federal Employer's Liability Act (F.E.L.A.) and her action is therefore governed by federal law rather than state law. *New York Central, etc. R. Company v. Tonsellito,* 244 U.S. 360 (1917).

In support of their motions to strike the jury demand made by Nettie Faye Warren, Burlington and Kershaw argue that federal law is applicable only to substantive legal issues involving Nettie Faye Warren's rights under F.E.L.A. and that all procedural issues are still governed by state law.

It is true that appellate courts in a number of decisions have made the differentiation between substantive and procedural issues and have applied state law to decide the latter. The difficulty however, is in trying to determine when a particular issue involves procedural law rather than substantive law. See, *Ely, The Irrepressible Myth of Erie,* 87 Harvard L. Rev. 693 (1974); *Chayes and Ely, Some Further Last Words on Erie, The Bead Game, The Necklace,* 87 Harvard L. Rev. 741 (1974).

In *Hanna v. Plumer,* 380 U.S. 460 (1965), the U.S. Supreme Court held that the mode of obtaining service of process by a plaintiff filing a suit in a federal court was governed by the Federal Rules of Civil Procedure and not by state law governing service of process. In that case, Massachusetts required the complaint to be served in person on the executor of an estate while Rule 4(d)(1) of the Federal Rules of Civil Procedure permitted service by leaving a copy with an individual at the defendant's usual place of abode. The Supreme Court determined that method of service involved procedural law rather than substantive law so that service of process would be governed by the federal rules.

In *Sibbach v. Wilson & Company,* 312 U.S. 1 (1941), Mrs. Sibbach, a plaintiff, refused to submit to physical examination for purposes of discovery by the defendant although ordered to do so by the federal court. She lived in Illinois. Under Illinois law, a defendant was not able to obtain an order requiring a plaintiff to submit to physical examination. The U.S. Supreme Court rejected Mrs. Sibbach's contention on appeal that the issue whether she was required to submit to physical examination involved substantive rights and should therefore be governed by Illinois law. The U.S. Supreme Court stated:

> ...The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with this provision. If we were to adopt the suggested criterion of the im-

> portance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

In *Minneapolis and St. Louis Railroad Company v. Bombolis,* 241 U.S. 211 (1916), the railroad on appeal raised questions concerning the manner in which the plaintiff obtained a verdict in the state court in Minnesota. By the Constitution and laws of Minnesota in civil cases, after a case has been under submission to the jury for a period of twelve hours without a unanimous verdict, five-sixths of the jury are authorized to reach a verdict which is entitled to the legal effect of a unanimous verdict at common law.

Upholding the procedure followed by the Minnesota state court in reaching a verdict, the U.S. Supreme Court rejected the railroad's contention that the state court in enforcing a federal right under F.E.L.A. was required to comply with the 7th Amendment to the U.S. Constitution and require the jury to reach a unanimous verdict. The Supreme Court concluded that in this instance, the Minnesota state court could properly follow its own procedure in reaching a jury verdict.

However, in *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359 (1952), the U.S. Supreme Court took what appears to be a directly contrary view to its position in *Bimbolis.* Dice, a railroad fireman, was seriously injured when an engine in which he was riding jumped a track. When he filed suit in the Ohio state court, the railroad asserted as an additional defense that Dice had executed a release whereby he released the railroad from all claims for the sum of $924.63.

Following a trial before a jury, a verdict and judgment was rendered in favor of Dice. The trial court then granted judg-

ment notwithstanding the verdict. This judgment was reversed by the Ohio Court of Appeals but the Ohio Supreme Court reversed the Ohio Court of Appeals and sustained the trial court's action. The Supreme Court of Ohio concluded that the issue whether there was fraud in the execution of the release was equitable in nature and therefore was properly decided by the judge rather than by the jury.

On appeal to the U.S. Supreme Court, the decision of the Supreme Court of Ohio was reversed. The U.S. Supreme Court concluded that Dice, in asserting his F.E.L.A. claim, was entitled to a jury trial on the issue whether the release was obtained from him by fraud as well as the other issues. The U.S. Supreme Court stated:

> We have previously held that 'the right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" ' and that it is 'part and parcel of the remedy afforded railroad workers under the Employer's Liability Act.' *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L.Ed. 1444. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. *Brown v. Western R. Co.* 338 U.S. 294, 70 S. Ct. 105, 94 L.Ed. 100.

The dissenting opinion in *Dice* pointed out that Ohio was merely following the general rule that actions which are equitable in nature do not carry with them the right to jury trial. In Ohio, as in Alabama, an action seeking to cancel or reform a written instrument obtained by fraud is equitable in nature and does not carry with it the right to a jury trial.

The majority opinion, however, concluded that the right to jury trial was a substantive right and therefore governed by federal law in claims asserted under F.E.L.A.

In the present case, Burlington and Kershaw argue that *Dice* is not applicable because that case involved the cancellation of a release obtained by fraud while Nettie Faye Warren in the present case seeks to vacate a consent judgment as being obtained by fraud. In the letter brief filed by counsel for Burlington the following statement is found:

> The conclusion of the majority in *Dice* that a jury trial is to be protected is in the context where access to the courts has not been obtained. In that sense the release agreement is a self-help mechanism. Unlike the release situation, the plaintiff in this case has availed herself of the courts. The fact that she elected to effect a consent judgment and not to invoke a jury does not mean that a right has been denied. By coming to the court, the plaintiff has invoked certain other protections available. She has received the benefit of judicial approval...

The consent judgment entered by the Circuit Court of Walker County, Alabama did not represent the culmination of litigation or of a lawsuit previously filed by Nettie Faye Warren. According to the testimony of Nettie Faye Warren and also of the Burlington employee, William E. Bird, she was told that $150,000 was all she would get and she agreed to accept that amount plus the $1,500 advance in settlement of her claims. Nettie Faye then went to the office of the Burlington attorney with William Bird. Burlington's attorney prepared the complaint to be signed by Nettie Faye Warren and explained to her that Burlington and Kershaw were accepting service of the same. Nettie Faye then went to the judge's chambers accompanied by Burlington's attorney and William Bird.

According to Bird's testimony, the proceedings before the Circuit Judge involved the following:

> He asked her, I think the first question he asked Mrs. Duckworth was how much education she had; and she told him. He asked her if she had talked to an attorney, and she told him that no, she had not.
>
> He asked her if she had discussed it with members of her family. She said, 'yes.' He asked her if she understood that in signing this, if she was aware that this was a full and final settlement for any and all claims related to that; and she said, 'yes, sir,' she did. He asked her if she was satisfied with that, and she said that she was. That was basically the conversation that took place.

It is true that a final judgment rendered by a court of competent jurisdiction stands on a different footing than a release. This is true even though the judgment is a consent judgment. *Myers v. Myers,* 266 Ky. 831 100 S.W. 2d 693 (1936); *Marietta Chair Co. v. Henderson,* 49 S.E. 312 (Ga. 1904); *Sawyer v. Smith,* 552 S.W. 2d 936 (Ct. of Civ. App. of Tex. 1977); *Irvine Toll Bridge Co. v. Williams,* 3 S.W. 2d 193 (Ky. Ct. of App. 1928); *Wood Brothers Construction Co. v. Yankton County,* 54 F.2d 304 (8th Cir. 1931).

In *Marietta Chair Co. v. Henderson, supra,* the Supreme Court of Georgia stated:

> ...Parties are, of course, bound by judgments rendered by courts of competent jurisdiction to which they have submitted their controversies, and the judgments bind them whether they expressly agree to them or not, and an express agreement that a particular judgment should be rendered gives to that judgment no peculiar character, and renders it no more sacred than the ordinary judgment. While a judgment is a contract of record, the agreement which the law implies from such a contract is simply that the parties will stand to and abide what has been decreed in the case upon the law and the facts then involved, or which could have been properly involved...

Acknowledging that a judgment was entered, Nettie Faye Warren now attackes the judgment as having been obtained by fraud and seeks its cancellation. She has the right under the laws of the state of Alabama to make a direct attack upon the judgment in an independent proceeding as she has done in this case. However, because her claim is asserted under F.E.L.A., she also has the right as a claimant under F.E.L.A. to demand a jury for the trial of the issues related to the question whether the consent judgment was obtained by fraud.

In both *Dice* and the present case, the F.E.L.A. claimant has asserted a claim which is equitable in nature; in *Dice,* the plaintiff was seeking to cancel a relase as having been secured by fraud. In the present case, the F.E.L.A. claimant is seeking to cancel a consent judgment as having been obtained by fraud. In both cases, the claimant would not be entitled to a jury trial under state law to decide such issues. However, under *Dice,* the F.E.L.A. claimant is guaranteed the trial by jury for such issues as a substantive right. Under *Dice,* Nettie Faye Warren is entitled to a jury trial on the issue whether the consent judgment was obtained by fraud.

In accordance with this opinion, the motions filed by Burlington and Kershaw to strike the demand for jury are hereby overruled.

C. Motion by Kershaw to dismiss or in the alternative for summary judgment.

In support of its motion for summary judgment, Kershaw argues that the consent judgment entered by the Circuit Court of Walker County, Alabama on January 2, 1980 has the legal effect of finally resolving all claims for damages against Kershaw by the dependent widow and children of James B. Duckworth, deceased and also all claims by the estate of James B. Duckworth, deceased, against Kershaw for damages based on the accident resulting in James B. Duckworth's death.

According to Kershaw, the final judgment is valid and not subject to cancellation as to Kershaw because the undisputed evidence indicates that Kershaw did not participate in or have knowledge of any alleged fraudulent conduct on the part of Burlington's employees which is the basis for Nettie Faye Warren's attack on the judgment rendered by the Circuit Court of Walker County.

Reviewing the deposition of Nettie Faye Warren, she testified as follows concerning Kershaw:

> Q. Now, did you at any time have any dealings with any one from Kershaw Manufacturing Company?
>
> A. No, sir. You are the first person I have met or even heard of being with that company.
>
> Q. Alright. Did Mr. Bird at any time tell you that he was representing Kershaw in any capacity?
>
> A. The only thing he mentioned about Kershaw is that they made the machine.
>
> * * *
>
> Q. Did I understand you correctly when you told me that the first knowledge you had that Kershaw had contributed any monies towards the settlement was after you got home and you read it?
>
> A. I read that about money. Now, he had mentioned Kershaw's name when we talked about the machine that my husband had got hurt on.
>
> * * *
>
> Q. I have just got a question or two. Mrs. Warren, you said that you believe that I am the first person that you have seen representing Kershaw?
>
> A. Yes.

Q. And that you understand that Mr. Bird was not representing Kershaw but was representing the railroad; is that correct?

A. Yes.

Q. What is it that you allege that Kershaw did wrong to mislead you in any way?

A. I can't — okay. The $40,000, is that what ya'll paid?

Yes.

Okay. The Kershaw Manufacturing Company to me was just a name that had made the machinery.

* * *

Q. (By Mr. Martin) As I understand it then, neither Kershaw nor anyone acting on Kershaw's behalf has ever made any representation whatsoever to you; is that correct?

Mr. Burge: As far as you know.

A. As far as I know.

Nettie Faye Warren acknowledged in her testimony that no representations were made to her by anyone purporting to act on behalf of Kershaw. She did not learn that Kershaw was involved in the settlement until she read the papers including the final judgment when she arrived home after the settlement had been made.

In his deposition, William E. Bird testified as follows:

Now, who did you deal with, if you dealt with anyone, that had any connection with Kershaw Manufacturing Company I-n-c.?

A. I didn't deal with Kershaw at all.

* * *

Q. Who told you that Kershaw was going to pay $40,000 toward a settlement?

A. That came from the general claims office after Mrs. Duckworth and I arrived at an agreement, and I was told that there was a contribution from them.

Q. You had reached the agreement based on $151,000. After that is when you learned that Kershaw was making some kind of contribution?

A. Yes sir.

Q. So at the time that you made the agreement with Mrs. Duckworth Warren you did not know that Kershaw was making any contribution?

A. No sir...

Bird testified that he had no discussions with anyone at Kershaw concerning the settlement; that he received no instructions or directions from anyone at Kershaw regarding the settlement and that at all times he was acting strictly as a representative for Burlington. He further testified that he did not at anytime represent to Nettie Faye Warren that he was acting on behalf of Kershaw.

The settlement of Nettie Faye Warren's claims against Kershaw is treated as a separate settlement in the consent judgment which awards Nettie Faye Warren the sum of $40,000 against Kershaw.

No evidence has been presented to indicate that Kershaw itself was guilty of any fraudulent conduct or that it knowingly participated or assented to any fraudulent conduct on the part of Burlington.

In *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448 (3rd Cir. 1961), Taxin asserted claims for violation of the Anti-Trust Laws against two groups of defendants, one associated with Food

Fair Stores, Inc., and the second group associated with Samuel P. Mandell Co., Inc. As one of the defenses, both groups of defendants pleaded that the Taxins had executed a general release releasing them all from all claims under the anti-trust laws. In response, the Taxins executed affidavits stating that they had been induced to execute the release instrument by a promise made in bad faith by the Food Fair Stores, Inc. defendants that Food Fair Stores would buy $500,000 worth of fruit and produce from them annually. The affidavits and allegations filed by the Taxins attacking the release did not charge that the Mandell defendants participated in or even knew of the alleged misrepresentation.

Upholding the summary judgment granted by the trial court in favor of the Mandell defendants, the U.S. Court of Appeals for the 3rd Circuit stated:

> The exculpation of the Mandell defendants was one important basis of the District Court's conclusion that the release was valid as to these parties. In analogous circumstances the Court of Appeals for the 2nd Circuit has suggested that it would be inequitable to deny one anti-trust defendant the benefit of the settlement and release solely because of fraud, unknown to him, on the part of another defendant in connection with such settlement and release. *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 2 Cir. 1960, 278 F.2d 798, 802. This is in accord with the rule of §477 of the Contracts Restatement which reads as follows:
>
> 'Fraud or material representation by a third person renders a transaction voidable by a party induced thereby to enter into it if the other party thereto'
>
> (a) 'has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction, or'

(b) 'is affected by the fraud or misrepresentation of the law of Agency or of Trust.'

Also see *Hoge v. Hoge,* 1 Watt. (Penn.) 163 (1832).

Kershaw has changed its position materially by reason of the release, having paid the sum of $40,000 to Nettie Faye Duckworth, as consideration for the discharge of its liability. No evidence has been presented that Kershaw participated in the negotiations with Nettie Faye Warren leading to the settlement of her claims or that Kershaw knew or had notice of facts from which it should have known by the exercise of reasonable diligence that the settlement of Nettie Faye Warren's claim against it had been obtained by fraud.

It would be inequitable to deny Kershaw the benefit of the settlement and release solely because of fraud, unknown to it, on the part of Burlington.

Accordingly, the Motion for Summary Judgment filed by Kershaw Manufacturing Company, Inc. is hereby granted. Judgment is hereby rendered in favor of Kershaw Manufacturing Company, Inc. and against the plaintiffs.

6. *Discovery.* The parties are given leave to proceed with further discovery provided it be completed at least twenty (20) days prior to the trial.

At least twenty (20) days prior to the trial, each of the parties to this litigation shall furnish and make available to each of the other parties, for inspection and copying, all documents, bills, rep orts, photographs and other exhibits which each such party intends to utilize at trial. Unless otherwise specifically agreed between the parties, each shall be precluded from offering any exhibits not so provided to each of the other parties (other than purely for impeachment purposes) unless relieved by the Court for good cause shown. Upon such documents being exhibited to the parties herein or counsel for each such party, each of the parties shall be deemed to have agreed that such documents and

exhibits are authentic and genuine and that any photograph included in said exhibits fairly and accurately portrays the scene therein depicted and that such photographs and copies of such documents may be utilized at trial to the same extent as the originals without accounting for such originals, unless objection is made by a party within seven (7) days after being shown such document or exhibit. In the event that any such objection shall be made, the party making the same shall also state the basis for grounds for such objection. No party may object to the authenticity or genuineness of any document or exhibit on the ground that he has no knowledge of the same unless such party has first exercised reasonable diligence in his efforts to ascertain and verify the same. Unless a party has given notice to the contrary within seven (7) days after having been shown the same, each party shall also be deemed to have agreed for purposes of this action that any bills for services or materials are reasonable in amount for the services or materials therein billed.

At least twenty (20) days prior to trial, each of the parties shall exchange lists stating the names and addresses of all witnesses which each of the parties intends to use in the trial of this cause. The listing of a witness does not commit the party to have such witness available at trial or to call such witness. In the event any of the witnesses are expert witnesses, the list shall include the substance of the opinion of any expert witness (other than medical experts) as provided in Rule 26. However, each of the parties shall not be required to furnish the names of rebuttal witnesses, the necessity for whose testimony such party could reasonably not have anticipated before the time of trial.

ORDERED this 15th day of June, 1984, that the above provisions be binding on all parties unless modified by further order for good cause shown.

Marvin E. Cherner,
Circuit Judge

Copies to:
Frank O. Burge, Esq.
Scott A. Powell, Esq.
Vastine Stabler, Esq.
Jack J. Hall, Esq.

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

No. _____

Ex Parte Burlington
Northern Railroad Company,
Petitioner

v.

Judge Marvin E. Cherner,
sitting as Judge of the
Circuit Court of the Tenth
Judicial Circuit of Alabama,
Respondent.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Petitioner, Burlington Northern Railroad Company brings this petition for mandamus to issue to the respondent, the Honorable Marvin E. Cherner, sitting as Judge of the Tenth Judicial Circuit of Alabama, and respectfully shows and represents to your Honors as follows:

1. *Proceedings.* The relevant proceedings in the Circuit Court are as follows:

a. Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth, brought suit in the Tenth Judicial Circuit Court of Alabama against St. Louis-San Francisco Railway Company, Burlington Northern Railway Company and Kershaw Manufacturing Company ("Kershaw"), being Case No. CV-81-4859. Burlington Northern Railway Company is now known as Burlington Northern Railroad Company and is the successor corporation to St. Louis-San Francisco

Railway Company which no longer exists. (Reference hereinafter to Burlington Northern Railroad Company and its prececessor corporations will be to "Burlington Northern.") The plaintiff alleged that her deceased husband was a laborer for Burlington Northern when he was fatally injured on the job and claimed that Burlington Northern was guilty of negligence that proximately caused the death of her husband. The claim against Burlington Northern is governed by the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq* ("F.E.L.A."). She also claimed that Kershaw was liable to her under the provisions of the extended manufacturer's liability doctrine. The plaintiff further alleged that a judgment was entered in her favor in the amount of $151,500.00 in the case of *Nettie Faye Duckworth v. St. Louis-San Francisco Railway Company and Kershaw Manufacturing Company,* CV-80-02, in the Circuit Court of Walker County, Alabama, which was procured by fraud and therefore null and void. The complaint contained no tender or offer to return the proceeds obtained in satisfaction of the previous judgment. Copies of the original Complaint and plaintiff's First Amendment to Complaint are attached to this petition as Exhibits 1 and 2, repectively.

b. Burlington Northern filed a Motion to Dismiss and alternatively a Motion to Transfer to Equity Division. The ground of the motion to dismiss was that the allegation of fraud had not been stated with particularity as required by Rule 9(b), Ala. R. Civ. P. The motion to transfer to equity was based on the rule that an independent action to set aside an earlier judgment is an equity action. A copy of the motion, with exhibits, is attached to this petition as Exhibit 3. (Kershaw Manufacturing filed parallel motions to those filed by Burlington Northern, but we have not attached or summarized the Kershaw proceedings because Kershaw is not involved in this petition.)

c. On May 12, 1982 Judge Thomas E. Huey, then Presiding Judge of the Tenth Judicial Circuit granted the motion to dismiss on the ground of insufficient particularity which

resulted in the filing of an amended complaint which is reproduced as Exhibit 2. A copy of the case summary sheet is attached as Exhibit 4

d. Following the filing of the amended complaint, Burlington Northern refiled the motion to transfer to the Equity Division and on January 28, 1983, Judge John N. Bryan granted the motion. See Exhibit 4. A copy of the motion is attached to this petition as Exhibit 5.

e. Following the transfer to the Equity Division, Burlington Northern filed a motion to strike plaintiff's jury demand on the ground that the plaintiff was not entitled to a jury in this equity action to set aside a final judgment. A copy of the motion is attached to this petition as Exhibit 6.

f. Judge William A. Thompson did not rule on the motion, but on October 28, 1983, upon consideration of the "unique issues presented by the claim in this action and the defenses thereto" retransferred the case to the Civil Division for special assignment to Judge Marvin Cherner and all pending motions were placed on Judge Cherner's docket. A copy of the order is attached to this petition as Exhibit 7.

g. On June 15, 1984, respondent issued a Pre-trial Order which, *inter alia,* denied the motion to strike the jury demand. Without denying that a claim designed to set aside a prior judgment was a nonjury action under Alabama law, Judge Cherner based his decision on federal cases which have mandated a jury trial of other issues raised in F.E.L.A. proceedings. A copy of the Pre-trial Order is attached to this petition as Exhibit 8.

2. *Statement of the Issue:* The sole issue raised by the action of the respondent is whether the Federal Employers' Liability Act mandates a trial by jury of an independent action to set aside an earlier consent judgment entered in a Federal Employers' Liability Act action.

3. *This is a proper case for mandamus.* Several Alabama cases have considered the appropriateness of the writ of mandamus as a remedy for the denial of a motion to strike a demand for a jury trial. In *Ex Parte Merchants Nat. Bank of Mobile,* 257 Ala. 663, 60 So. 2d 684 (1952), petitioner requested a writ of mandamus commanding a circuit judge to vacate and set aside his order transferring the cause in question to the jury docket for trial. It was the judge's granting of this transfer and his concurrent dismissal of the motion to strike which prompted the petitioner's request for mandamus. Before ruling that the writ should be issued, the Court stated,

> The purpose of this proceeding is to review the ruling of the trial court in making said transfer to the jury docket as stated above. The first question presented for consideration in that connection is the right of petitioners to have said ruling reviewed by writ of mandamus. It has been the custom of this Court to grant such a mandamus for that purpose with respect to interlocutory orders and judgments of the court as to which an adequate remedy is not available on appeal. This procedure has been made use of in respect to the transfer of causes from the law side to the equity side of the court and *vice versa. Id.* at 664. (citations omitted)

A similar situation was presented in *Ex Parte Spence,* 271 Ala. 151, 122 So. 2d 594 (1960), which centered around a mechanic's lien suit. The defendant — owner of the property on which the lien was sought — demanded a jury trial. This demand was subsequently granted, and the petitioner requested a writ of mandamus to command the circuit judge to vacate and set aside his order/decree overruling the petitioner's motion to strike the demand for trial by jury. Prior to its discussion of the merits, the Court stated:

> That mandamus is the proper remedy to review the respondent judge's action in overruling [petitioner's] motion to

> strike the demand for jury trial is not questioned, and in fact seems to be conceded. *Id.* at 152. (citations omitted)

Thus, an interlocutory order which overrules a motion to strike a demand for jury trial is appropriately reviewed by writ of mandamus.

4. *Reasons why the writ should issue.* We submit that there are three main steps in the analysis of the petition. a. Under the procedural law of Alabama the independent action to set aside a judgment is unquestionably an equitable action, b. The F.E.L.A. does not change or alter Alabama law with respect to finality of judgments, c. Even if the F.E.L.A. were applicable to finality of state judgments, such a construction would be unconstitutional. We will deal with each of these three issues.

A. *Alabama law disallows a jury trial.* The long standing rule disallowing a jury trial of independent actions in equity to set aside earlier judgments was reaffirmed recently in *Ex parte Jones,* 447 So. 2d 709 (Ala. 1984). This Court there observed that efforts to set aside judgments were unknown at common law and therefore historically characterized as equitable in nature. "In equity a party is not entitled, as a matter of right, to a jury to determine issues of fact unless it is so provided by statutory or constitutional provisions" *Id.,* at 711. The petitioner is aware of no such constitutional or statutory provision mandating a jury trial to determine the validity of a consent judgment in this instance; indeed, the respondent and the plaintiff have also been unable to produce authority for such a mandate.

The decision of *Ex parte Jones* is consistent with a long line of Alabama and federal cases which recognize that an equitable issue is not, as a matter of right, triable by a jury. *Pugh v. Calloway,* 295 Ala. 139, 325 So. 2d 135 (1976); 5 Moore's Federal Practice ¶38.11[6] (1982).

B. *F.E.L.A. does not require a different result.* Since this is an F.E.L.A. case, the Court must determine whether to apply

state or federal law. We first call to the court's attention that the F.E.L.A. law itself gives us some guidance as to whether the state or federal law would be controlling. Congress has provided that the state and federal courts have concurrent jurisdiction, 45 U.S.C. §56, and that, should an action be filed in the state court, it may not be removed to the federal court. 28 U.S.C. § 1445(a). These provisions represent an express conferral of jurisdiction on the state courts by Congress. It is fair to assume that Congress has been aware of the procedural differences that inevitably creep in among the various state systems and the federal courts.

In light of the above, the courts have regularly found that state procedural law and federal substantive law govern disposition of actions brought in state courts pursuant to the F.E.L.A. *Mills v. Pennsylvania New York Cent. Transp. Co.*, 16 Ohio St. 2d 704, 243 N.E.2d 99 (1968); *Midland Val. R. Co. v. Manios*, 307 P.2d 545 (Okla. 1957); *Rivera v. Atchison T. & S. F. Ry. Co.*, 61 N.M. 314, 299 P.2d 1090 (1956); *St. Louis-San Francisco Ry. Co. v. King*, 278 P.2d 845 (Okla. 1954); *McGuigan v. Southern Pac. Co.*, 112 C. A. 2d 104, 247 P.2d 415 (1952); *Roy v. Oregon Short Line R. Co.*, 55 Idaho 404, 42 P.2d 476 (1935); *Ecclesine v. Great Northern Ry. Co.*, 58 Mont. 470, 194 P. 143 (1920).

The next point of analysis would be to determine whether finality of and mode of attack on a state court judgment raises a procedural question. Referring back to the *Erie* line of cases which have struggled to draw a line between substance and procedure more than any other, the Supreme Court suggested in *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed 2d 8 (1965) that "When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.*, at 471, 14 L. Ed. 2d, at 17.

Rule 60(b) Ala. R. Civ. P. explicitly authorizes the independent equitable action as the basis for attack against a final judgment in this situation. It provides:

> This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court."

Hanna v. Plumer thus suggests that the means of setting aside a judgment would be deemed to be procedural.

Before *Hanna v. Plumer,* the generally recognized standard was articulated in *Guaranty Trust Co. v. York,* 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). The standard there stated is as follows:

> The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court? *Id.,* at 109, 89 L. Ed., at 2086.

The *Guaranty Trust* standard also leads to a conclusion that the jury trial is procedural. The determination of whether a case is to be tried by jury is neutral in that the ruling standing by itself does not dictate that one party as opposed to another should prevail. Instead, it must be classified as "a manner of or means by which a right to recover . . . is enforced."

Judge Cherner mistakenly relied on *Dice v. Akron, C & Y Railway Company,* 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952). *Dice* was a five to four decision in which the United States Supreme Court stated that a plaintiff in an F.E.L.A. case is entitled to a trial by jury to determine the validity of a release or similar device to liquidate or defeat an employee's claim.

Judge Cherner ruled that a consent judgment was such a device and thereby held that a consent judgment carries no more significance than a mere release negotiated between the parties. The *Dice* case involved a contractual release and not a consent judgment. In fact, no case has been found in which the *Dice* holding has been extended to a consent judgment. The question then becomes whether a consent judgment is to be treated the same as a contractual release.

There is a wealth of authority to indicate that consent judgments and contractual releases are indeed different. The United States Supreme Court has observed that a consent decree is not to be treated as a mere contract between the parties. *United States v. Swift & Company,* 286 U.S. 106, 76 L. Ed. 999 (1932). This notion was followed in *Aro Corporation v. Allied Witan Company,* 65 F.R.D 513 (N.D. Ohio 1975) aff'd 531 F.2d 1368 (6th Cir. 1976). These cases distinguish consent "settlement agreements" from contracts between parties designed to expedite possible legal disputes. The most distinguishing factor between the consent judgment and the private contracts was the dignity given the agreement by the Court. The consent judgment has the same res judicata affect as any other judgment, and attorneys, as officers of the court, are required to make every effort to insure that their client complies with the consent order. Further, the notions of finality attach with a consent judgment. The same strict requirements necessary to set aside a judgment by trial apply to a consent judgment.

Professor Moore clearly highlights the distinguishing characteristics of consent judgment and releases in the following passage:

> There are judicial pronouncements . . . to the effect that a consent or related type of judgment does not have res judicata effect, but gets its binding force and effect from the parties' consent and is on the nature of a contract. These statements are not supportable. The consent judgment may raise special problems in connection with other

> matters, such as splitting an action and collateral estoppel. But the fact remains that the judgement is not an *inter partes* contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication. 1A Moore's Federal Practice ¶0.409 [5] (1982)

The Alabama Supreme Court has regarded a consent judgment as equal to a judgment by trial. *Battle v. Morris,* 265 Ala. 581 93 So. 2d 428 (1957). In this case, a complaint in equity was brought to set aside a previous judgment rendered on the law side of the court. The Court treated the consent judgment with the same dignity as any judgment rendered following a trial. Such a ruling promotes the need for courts to have full power to render final resolutions of legal disputes.

Perhaps no better argument can be made for the distinction between consent judgments and releases than the different treatment they receive in Alabama. It is recognized that actions to set aside a release may be tried by a jury. *See e.g. Louisville and Nashville Railroad Company v. Steel,* 257 Ala. 474, 59 So. 2d 664 (1952); *Cooper v. Agee,* 222 Ala. 334, 132 So. 173 (1930). As previously demonstrated, a different rule obtains when the consent judgment is being attacked. The distinction between the two is hardly insignificant. Unlike the release situation, the plaintiff in this case has availed herself of the courts. Because a death case is involved, the specific approval of a circuit judge was required. By coming to the court, the plaintiff invoked all the protections available and received the benefit of judicial approval. It is not difficult to understand why the law has evolved so that a judge rather than a jury would retain the narrowly confined power to set aside the judicial orders of another judge.

The *Dice* case itself was confronted with powerful dissents during what frankly must be described as a liberal era. It is highly speculative to suggest that the *Dice* Court would have extended federal intrusion into state procedure to include the

preemption of the intended legal effect of a state court final judgment.

Should Judge Cherner's ruling stand, a question worth asking is, "Where will the line be drawn?" Suppose that jury trials are permitted to set aside consent judgments. Will the same rule apply when judgments in contested cases are attacked? The idea that litigants are entitled to only one trip to the courthouse is strongly imbedded in our system of justice. We submit that the well stated promise of justice in *Maddox v. Hunt,* 281 Ala. 335, 341, 202 So. 2d 543 (1967) should be controlling in this case:

> Courts of equity will set aside and vacate judgments procured by fraud, accident, or mistake, and without negligence on the part of the complainant, if the complainant has a meritorious defense." *Barrow v. Londsey,* 230 Ala. 45, 159 So. 232; *St. John v. Campbell,* 250 Ala. 380, 34 So. 2d 584.
>
> However as stated in *Hendley v. Chabert, et al.,* 189 Ala. 258, 65 So. 993, this equitable power to set aside a judgment of another court is of great strictness, otherwise equity courts would supplant the jurisdiction of all other courts. *A due regard for the interest of society requires strictness and caution in the exercise of this power of equity to set aside judgments.* (emphasis added)

c. *It is unconstitutional for Congress to mandate a jury trial in proceedings to set aside a state court judgment.*

The respondent has apparently relied on the Commerce Clause for his determination that Congress may mandate a jury trial to set aside a consent judgment in an F.E.L.A. case. The United States Supreme Court case of *Minneapolis & St. Louis Ry. Co. v. Bombolis,* 241 U.S. 211, 60 L. Ed. 961 (1916), recognizes that neither the Seventh Amendment nor the Fourteenth Amendment require a jury trial of any issue in an F.E.L.A. case. This view was reiterated in the *Dice* case when

the court noted that had Ohio required no jury trial of negligence cases, then none would be required to determine the validity of a release. Thus, the only other constitutional provision which could ostensibly allow Congress to intrude on the State of Alabama is the Commerce Clause.

There is no dispute that the power of Congress to regulate interstate commerce is plenary save for the limitations expressed within the federal constitution. One such limitation is the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States especially, or to the people." This amendment has been held to protect "the ability of the State to carry out its constitutionally preserved sovereign function." *Transportation Union v. Long Island Ry. Co.*, 455 U.S. 678, 683 102 S. Ct. 1349, 71 L. Ed. 2d 547, 552 (1982).

A three-pronged test derived by the Supreme Court from *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), was developed to determine the applicability of the Tenth Amendment to a given case. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). The three tiers are as follows:

1) The statute must regulate the States as States;

2) The federal regulation must address matters that are indisputably attributes of state sovereignty; and

3) The States' compliance with the federal law must directly impair their ability to structure integral operations in areas of traditional government function.

If a particular piece of legislation meets each of the three tests, then the legislation will be unconstitutional unless the court finds that there is an overriding federal interest which must be protected.

In *National League of Cities v. Usery, supra,* the court defined the first test of Tenth Amendment analysis:

> "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of authority directed, not to private citizens, but to the States as States." *Id.,* at 845.

The first tier then limits Tenth Amendment application to the direct operations of state government. Acts of Congress pursuant to the Commerce Clause which only preempt state law determinations on the same subject matter are not precluded; rather, the Tenth Amendment bars regulation of powers peculiar to the states. For instance, a congressional rule requiring a jury trial to determine the validity of a release merely affects the rights of parties in a lawsuit, and does not directly impose on the state. But in prescribing the manner in which a state court judgment is to be set aside, Congress is directly intruding on state sovereignty and is acting unconstitutionally.

The second tier of the *Hodel* test limits the Tenth Amendment protection to attributes of sovereignty attaching to state governments. While the Congressional power to impose substantive rules of law in a particular case does limit the authority of state governments, this power does not strip the states of an attribute of sovereignty. Should Congress be allowed to determine the validity of state court judgments, however, then one of the most fundamental characteristics of sovereignty would be denied state governments; that, being the po .er to render valid and final judgments to resolve legal disputes. The ruling of Judge Cherner if upheld would extend this power to Congress.

Finally, the *Hodel* test asks whether state compliance with the federal law will impair its ability "to structure integral operations in areas of traditional governmental functions." *Id.,* at

287. Congress must actually intrude on an area of governmental function. To mandate a jury trial to determine the effect of a release does not intrude on a governmental function in an unconstitutional manner. However, when Congress attempts to prescribe the manner in which states may determine the propriety of their own legal judgments, then Congress has acted illegally and unconstitutionally. Indeed, if Congress has attained this power under the Commerce Clause, then the states should be disregarded as meaningful entities within the federal system.

It is helpful to look at some of the fact situations where the *Hodel* test has been applied. In *National League of Cities v. Usery, supra,* the Court ruled on the validity of a 1974 amendment to the Fair Labor Standards Act which applied wage and hour laws to state and municipal governments. The Court struck the amendments as violative of the Tenth Amendment; a direct displacement of "the State's freedom to structure integral operations in areas of traditional government functions" is constitutionally impermissible. *Id.* at 852. In particular, Congress had directly regulated the States as States and had intruded on state employment decisions.

Congressional intrusions into the affairs of state governments were recently upheld in *Transportation Union v. Long Island Ry. Co.,* 455 U.S. 678 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982) and *Hodel v. Virginia Surface Min. and Recl. Ass'n., supra.* In *Transportation Union,* the Court held that a state-owned railroad was subject to federal regulation since the operations of a common carrier is not a traditional government function. Similarly, the Court allowed Congress to regulate surface mining activities in *Hodel* in spite of state land regulation laws. There, the mining regulations ultimately governed the mining companies rather than Virginia. Thus, the regulation did not govern the States as States and was constitutionally permissible.

In conclusion, Judge Cherner's ruling cannot withstand constitutional muster because it would allow Congress to impede upon the most fundamental exercise of sovereignty by the

states. Under the Commerce Clause, Congress may not regulate state activities which are congruent with the very nature of a sovereign authority. Moreover, it is extremely unlikely that Congress intended to exercise such power when it legislated the F.E.L.A. An independent action to set aside a final judgment has been a matter for the equity courts throughout Anglo-American legal history. Since Congress failed to specifically require a jury trial to set aside consent judgments in the Act itself and since no federal court has construed this requirement from the Act, then the respondent should not have given the F.E.L.A. this unconstitutional construction. Given the silence of the federal government, this unwarranted intrusion into the Alabama Court System cannot be constitutionally permitted.

WHEREFORE, premises considered, petitioner respectfully prays:

(1) That the Honorable Marvin E. Cherner, sitting as Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, be made a party respondent to this petition and that process issue to said Honorable Marvin E. Cherner as such judge requiring him to plead and answer in the manner and within the time set by law and the rules for this Court;

(2) That this Court will grant a Writ of Mandamus directed to the respondent, returnable to this Court, ordering and commanding said respondent to strike the plaintiff's demand for jury trial of the equitable issues in this case.

(3) Petitioner further respectfully prays for such other and further relief to which it may be entitled under the facts above alleged.

L. Vastine Stabler Jr.

Michael C. Quillen

Kenneth D. Davis

Attorneys for Petitioner

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned authority in and for said County and State, this day personally appeared Michael C. Quillen, who being by me first duly sworn deposes and says as follows: affiant is counsel for petitioner and as such he is acquainted with the proceedings had and done in Nettie Faye Duckworth Warren v. Burlington Northern Railroad Company, Case No. CV-81-4859 in the Circuit Court of the Tenth Judicial Circuit of Alabama, Jefferson County, Alabama referred to in the foregoing petition and with the averments contained in said petition and the facts stated therein are true and correct to the best of his knowledge, information and belief and the exhibits attached thereto are true and correct copies of the same.

Michael C. Quillen

Sworn to and subscribed
before me this 20th day
of July 1984.

Ella Mae Hale
Notary Public

My commission expires: 6/29/85

REQUEST FOR ORAL ARGUMENT

Because this is the first case to our knowledge in this or any other Court in which there has been an attempt to require a jury trial of independent actions in equity to set aside consent judgments and because important state and federal choice of law rules have been raised, we request the opportunity to argue orally on this Petition for Mandamus.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Mandamus has been duly served upon Honorable Judge Marvin E. Cherner, Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama and Frank O. Burge, Jr., 1620 First Alabama Bank Building, Birmingham, Alabama, 35203 by placing a copy of the same in the U.S. Mail, postage prepaid and properly addressed this the 20 day of July, 1984.

Kenneth D. Davis
Of Counsel

APPENDIX F

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
(205) 252-8800

April 18, 1983

HAND DELIVERY

Judge Marvin Cherner
Tenth Judicial Circuit Court
Jefferson County Courthouse
716 North 21st Street
Birmingham, Alabama 35263

RE: Nettie Faye Duckworth Warren v. Burlington Northern Railroad
Civil Action No. CV-81-4859

Dear Judge Cherner:

This letter will set down the legal principles which should be controlling in your determination to whether our motion to strike the jury demand should be granted. Frank Burge made numerous claims in the argument as to the merits of his contention that the consent judgment was obtained by fraud. I do not deem this to be the appropriate time to respond to his factual allegations. This letter deals solely with the question as to whether the finality of an Alabama judgment can be superceded by a subsequent jury trial simply because the case happens to be brought under the Federal Liability Act. We will deal with the merits of his claim at a later time.

There is no question but that under Alabama law the motion to strike the jury demand is due to be granted. Under Rule 60(b) of the Alabama Rules of Civil Procedure, as well as the law of Alabama prior to the enactment of the Rules of Civil

Procedure, the only means of attacking a judgment that is more than four months old is by means of an independent action in equity. *Waldrop v. Waldrop,* 395 So. 2d 62 (Ala. Civ. App. 1981). The independent action is limited in scope to several types of allegations, and one such permissible allegation is that the judgment was obtained by fraud practiced on the court. *Denton v. Sanford,* 383 So. 2d 847 (Ala. Civ. App. 1980). As best we can tell, the plaintiff's allegations are designed to conform to that type of claim. The Supreme Court has recently reaffirmed that the plaintiff is not entitled to a jury in an attempt to set aside such a judgment notwithstanding the union of law and equity under the federal rules. *Jones v. Fairly,* 18 A.B.R. 1275 (1984). The principles are the same when the judgment is obtained by consent. *Battle v. Morris,* 265 Ala. 581, 93 So. 2d 428 (1957).

Interestingly enough, the law of Alabama as to jury trial with respect to setting aside releases is different. The Supreme Court of Alabama has long recognized that a claim that a release was obtained by fraud may be heard before a jury. See *e.g. Cooper v. Agee,* 222 Ala. 334, 132 So. 173 (1930). Thus, there is nothing unusual about the proposition that a jury trial is available when the plaintiff is attempting to set aside a release but is impermissible when a final judgment is being attacked.

The plaintiff relies on a number of F.E.L.A. cases which hold that either party is entitled to a jury trial on the question of whether a release should be set aside on the ground of fraud. Those authorities unquestionably exist and hold consistently with the Alabama Non-F.E.L.A. cases. Plaintiff has not cited any case which holds that a jury trial is required to set aside a judgment. Plaintiff's case hinges on the language in *Dice v. Akron, Canton & Youngstown Railroad Co.,* 342 U.S. 359, 361-2, 72 S. Ct. 312, 96 L.Ed. 398 (1951), "Releases and other similar devices designed to liquidate or defeat injured employees' claims." The plaintiff claims that a state court judgment is a similar device.

It is hard to attribute to the Supreme Court an intent to sweep aside the finality of judgments in state court actions in such an off-hand way. Indeed I would suggest that had such matter been addressed and the court pronounced the radical position now pursued by the plaintiff, Justice Black would have been unable to maintain his precarious five to four majority. We submit that the quoted language refers to cover contractual devices which operate as a release by other names.

We first call to the court's attention that the F.E.L.A. law itself gives us some guidance as to whether the state or federal law would be controlling. Congress has provided that the state and federal courts have concurrent jurisdiction, 45 U.S.C.A. § 56, and that, should an action be filed in the state court, it may not be removed to the federal court, 28 U.S.C.A. § 1445(a). These provisions represent an express conferral of jurisdiction on the state courts by Congress. It is fair to assume that Congress has been aware of the procedural differences that inevitably creep in among the various state systems and the federal courts. Moreover, under the application of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 Sup. Ct. 817, 82 L.Ed. 1188 (1938) and its progeny, the differences in procedure, as opposed to substance, in diversity cases has served to underline that uniformity of procedural questions is not pursued, even if such were constitutionally possible.

In light of the above, the courts have regularly found that state procedural law and federal substantive law govern disposition of actions brought in state courts pursuant to the F.E.L.A. *Mills v. Pennsylvania New York Cent. Transp. Co.,* 16 Ohio St. 2d 704, 243 N.E.2d 99 (1968); *Midland Val. R. Co. v. Manios,* 307 P.2d 545 (Okla. 1957); *Rivera v. Atchison T. & S. F. Ry. Co.,* 61 N.M. 314, 299 P.2d 1090 (1956); *St. Louis-San Francisco Ry. Co. v. King,* 278 P.2d 845 (Okla. 1954); *McGuigan v. Southern Pac. Co., 112 C. a. 2d 104, 247 P.2d 415 (1952); Roy v. Oregon Short Line R. Co.,* 55 Idaho 404, 42 P.2d 476 (1935); *Ecclesine v. Great Northern Ry. Co.,* 58 Mont. 470, 194 P. 143 (1920).

The next point in the court's analysis would be whether finality of a state court judgment and mode of attack on it is procedural. Referring back to the *Erie* line of cases which have struggled with drawing a line between substance and procedure more than any other, the Supreme Court suggested in *Hanna v. Plumer,* 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed 2d 8 (1965) that "When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." Rule 60(b) in the federal and state rules of civil procedure explicitly authorize the independent equitable action as the basis for attack against a final judgment in this situation. *Hanna v. Plumer* thus suggests that it would be appropriate to look at the Federal Rules as evidence of congressional intent as to the scope of procedure.

Both federal and state rule 60(b) provide:

> "This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." (There are differences in the rules in omitted parts which are not here pertinent.)

A law review article specifically cited by the Notes of the Advisory Committee on Rules with respect to the 1946 amendment pointed out that Rule 60(b) was based on a California statute and the authors concluded:

> From the California decisions it is reasonable to construe Rule 60(b) as follows:
>
> 1. The Rule applies to both interlocutory and final orders and judgments.
>
> 2. Even without the first saving clause, and a fortiori with it, Rule 60(b) provides a cumulative remedy and does not impair any ancillary or independent jurisdiction of the

federal courts to relieve a party from a judgment or order, and hence such proceedings as were available in the federal courts as audita querela, writs of error coram nobis, bills of review, and *independent actions in equity* are still available.

3. *Independent equitable relief may be obtained,* in addition to an original action, by a motion addressed to the court in which the judgment or order was rendered. Ancillary proceedings must, of course, be brought in that court. (Emphasis added.)

Moore & Rogers "Federal Relief from Civil Judgments", 55 YALE L. J. 622, 653 (1946).

From the foregoing it is clear that both the state and federal court have regarded the independent action in equity to attack a judgment as a procedural matter.

Another useful analysis would be to use the Seventh Amendment standard to define which cases in the federal court require a jury trial. Here again it has been recognized that traditional equitable actions are outside the Seventh Amendment and in particular the independent attack on a judgment in a non-jury action. 5 Moore's Federal Practice ¶ 38.11[6] (1982).

The conclusion of the majority in *Dice* that a jury trial is to be protected is in the context where access to the courts has not been obtained. In that sense the release agreement is a self help mechanism. Unlike the release situation, the plaintiff in this case has availed herself of the courts. The fact that she elected to effect a consent judgment and not to invoke a jury does not mean that a right has been denied. By coming to the court, the plaintiff has invoked certain other protections available. She has received the benefit of judicial approval. Now she attacks that procedure and asks that a jury rather than a judge determine that a judgment in a brother judge's court room was fraudulently procured. This requested departure from precedent is hardly insignificant. I believe that your honor can attest

that a primary responsibility of a Circuit Judge is to accomplish final resolution of disputes. Settlements as well as fully contested matters are handled by the Circuit Judge in such a manner as to insure that they are ended, to the extent humanly possible. This effort is undergirded by the rules of finality of judgments. Indeed the equitable relief is extraordinary in nature because of the balancing of finality of judgment against strictly confined equities. For that reason, the courts are urged not to take lightly any effort to undo these judgments.

As stated by the Supreme Court of Alabama in *Maddox v. Hunt,* 281 Ala. 335, 341, 202 So. 2d 543 (1967):

> Courts of equity will set aside and vacate judgments procured by fraud, accident, or mistake, and without negligence on the part of the complainant, if the complainant has a meritorious defense. *Barrow v. Londsey,* 230 Ala. 45, 159 So. 232; *St. John v. Campbell,* 250 Ala. 380, 34 So. 2d 584.
>
> However, as stated in *Hendley v. Chabert, et al.,* 189 Ala. 258, 65 So. 993, this equitable power to set aside a judgment of another court is of great strictness, otherwise equity courts would supplant the jurisdiction of all other courts. *A due regard for the interests of society requires strictness and caution in the exercise of this power of equity to set aside judgment.* (Emphasis added)

We submit that this court sitting in equity must try this case according to the well-established principles recognized in federal and state courts. Accordingly, our motion is due to be granted.

Very truly yours,

L. Vastine Stabler, Jr.

LVSJr/msw
cc: Mr. Frank O. Burge, Jr.
Mr. Jack J. Hall

APPENDIX G

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Civil Action No: CV81-4859

Nettie Faye Duckworth Warren, Administratrix of the Estate of James B. Duckworth, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, Danny Duckworth, the totally dependent minor children of James B. Duckworth, Deceased,
Plaintiff,

v.

St. Louis - San Francisco Railway Company, a corporation, Burlington Northern Railway Company, a corporation, and Kershaw Manufacturing Company. Inc., a corporation,
Defendants.

SUMMONS

To Any Sheriff in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendants ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation and KERSHAW MANUFACTURING COMPANY, Inc., a corporation.

Each defendant is required to serve a written answer to the complaint upon Scott A. Powell, attorney of record for the plaintiff, whose address is 1620 First Alabama Bank Building, Birmingham, Alabama 35203-3269, within thirty (30) days after service of this summons with the exclusion of the day of service, and to file the original of the said written answer with the clerk of the court within the said thirty day period. If any defendant fails to do so, a judgment by default may be entered against that defendant for the relief claimed in the complaint.

DATED: Nov. 12, 1981

Polly Conradi
Clerk of the Court

COMPLAINT

1. The plaintiff is the totally dependent surviving widow of James B. Duckworth, deceased, and sues in her capacity as administratrix of the estate of JAMES B. DUCKWORTH, deceased and for her benefit as said totally dependent surviving widow. Plaintiff also sues for the benefit of Anita Duckworth, a minor sixteen (16) years of age, Randy Duckworth, a minor twelve (12) years of age, Bobby Duckworth, a minor ten (10) years of age, and Danny Duckworth, a minor four (4) years of age, who are the totally dependent surviving minor children of JAMES B. DUCKWORTH, deceased.

2. At all times referred to herein the plaintiff was an employee of the defendant and was working within the line and scope of his employment for the defendant. At all times referred to herein the defendant was a common carrier by railroad engaged in the business of operating a railroad in interstate commerce for hire for the purpose of carrying freight and passengers in interstate commerce. At all times referred to herein the plaintiff's duties of employment for the defendant were in the furtherance of such interstate commerce or directly or closely and substantially affected such interstate commerce. This action is brought under and by virtue of the provisions of the Federal Employers Liability Act, Tit. 45, U.S.C.A., §51, et seq.

3. Plaintiff avers that heretofore, on to-wit, the 21st day of December, 1978, JAMES B. DUCKWORTH, deceased, was working as a laborer for the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, successor corporation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, at or near Tupelo, Mississippi, when a bush hog operating nearby on the tracks and roadbed of the defendant, caused a wire to be thrown out of the unguarded portion of the blade, striking JAMES B. DUCKWORTH in the throat with such force that he was so severely injured that on, to-wit, the 26th day of December, 1978, he died.

4. Plaintiff avers that JAMES B. DUCKWORTH, deceased, was killed as a proximate result, in whole or in part, of the negligence of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, the successor corporation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, its agents, servants or employees, while acting within the line of scope of their employment for the defendant or by reason of a defect or insufficiency due to its negligence in its roadbed, tracks, bush hogs, safety practices, work practices, guards, guards on bush hogs, absence of guards on bush hogs, absence of warning signs on bush hogs warning JAMES B. DUCKWORTH of the inherent danger attendant with the operation of said bush hog.

5. Plaintiff further avers that the death of JAMES B. DUCKWORTH was proximately caused, in whole or in part, by the negligent failure of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, to use reasonable care to provide to JAMES B. DUCKWORTH, a reasonably safe place for him to do his work and labor for the defendant on the occasion of sustaining the injuries which resulted in his death.

6. Plaintiff further avers that the death of JAMES B. DUCKWORTH, was proximately caused, in whole or in part, by the negligent failure of the defendant, BURLINGTON

NORTHERN RAILWAY COMPANY, to provide guards on its bush hog machines when they knew or in the exercise of reasonable care should have known that said machine created an ultra-hazardous work situation and work station for the deceased, JAMES B. DUCKWORTH, but negligently failed to provide a guard around the machine proximately resulting in JAMES B. DUCKWORTH'S death.

7. Plaintiff further avers that heretofore, prior to December 21, 1978, the defendant, the KERSHAW MANUFACTURING COMPANY, INC., a corporation, manufactured this bush hop and plaintiff avers that the said defendant negligently breached the extended manufacture's liability doctrine of the State of Alabama and that the bush hog was not safely guarded and that said bush hog was negligently designed and negligently manufactured without said guarding attachment. Plaintiff further avers that said bush hog was negligently manufactured and negligently sold to the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation.

8. Plaintiff avers that as a proximate consequence of the said negligent breach of the extended manufacture's liability doctrine of the State of Alabama, the said defendant, KERSHAW MANUFACTURING COMPANY, INC., a corporation, directly and proximately contributed to the death of her said husband as aforesaid.

9. Plaintiff further avers that her said husband's death was proximately caused by the combined and concurring negligence of all defendants at the aforesaid time and place in the negligent manner as heretofore stated in this complaint as to all defendants.

10. Plaintiff further avers that heretofore, on to-wit, the 2nd day of January, 1980, a judgment was entered in the case of NETTIE FAYE DUCKWORTH v. ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY and KERSHAW MANUFACTURING COMPANY in the amount of one hundred fifty-one

thousand five hundered dollars ($151,500). Plaintiff further avers that said judgment is null and void in that said judgment was procured by fraud on the part of the defendants, its agents, servants or employees while acting within the lines of scope of their employment for the defendants. Plaintiff further avers that said judgment is null and void and that said judgment does not provide any allocation or distribution for the deceased minor children pursuant to Federal statutes.

11. As damages, plaintiff claims of the defendants the sum of five million dollars ($5,000,000.00) for the benefit of herself as the surviving dependant widow of JAMES B. DUCKWORTH, deceased, and for the benefit of her four minor children as totally dependant surviving children of JAMES B. DUCKWORTH, deceased.

12. Plaintiff demands trial by struck jury.

BURGE & FLORIE, P.C.
1620 First Alabama Bank Building
Birmingham, Alabama 35203-3269
(205) 251-9729

BY: Scott A. Powell

TRIAL COUNSEL: Frank O. Burge, Jr.
Scott A. Powell

PLAINTIFF'S ADDRESS:

Route 1
Guin, Alabama 35563

DEFENDANT'S ADDRESS:

BURLINGTON NORTHERN, INC.
Vastine Stabler, Jr.
1900 First National-Southern Natural Bldg.
Birmingham, Alabama 35203-3269

KERSHAW MANUFACTURING COMPANY
Donald C. Bailey
2205 West Fairview Avenue
Montgomery, Alabama 36108

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
30 South 18th Street
Birmingham, Alabama 35233

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-220

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

HON. MARVIN CHERNER, JUDGE OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

FRANK O. BURGE, JR.
BURGE, POWELL & WETTERMARK, P.C.
1230 First Ala. Bank Bldg.
Birmingham, Alabama 35203
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Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL EMPLOYERS' LIABILITY ACT REQUIRES A JURY TRIAL ON THE QUESTION OF WHETHER A CONSENT JUDGMENT WAS PROCURED BY THE FRAUD OF THE RAILROAD, NOTWITHSTANDING THE FACT THAT ALABAMA EQUITY PRACTICE STIPULATES A NON-JURY TRIAL ON AN ACTION TO SET ASIDE A JUDGMENT.

PARTIES TO THE PROCEEDING

Parties:

Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth
Burlington Northern Railroad Company
Judge Marvin Cherner, sitting as Judge of the Tenth Judicial Circuit of Alabama

Affiliated or related parties:

The parent company to Burlington Northern Railroad Company is Burlington Northern, Inc., which owns all the stock in the Burlington Northern Railroad Company. The following companies are affiliated with the Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
The Camas-Prairie Railroad Company
Davenport, Rock Island & Northwestern Railway Company
Galveston Terminal Railway Company
Houston Belt and Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal Transfer Railway Company
Longview Switching Company
Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Pueblo Terminal Union Depot and Railroad Company
St. Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Wichita Union Terminal Railway Company
Winona Bridge Company

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NO. 85-220

IN THE

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October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HON. MARVIN CHERNER, JUDGE OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATUTORY PROVISIONS

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the

surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. §51.

* * * * * *

Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. §55.

STATEMENT OF THE CASE

Nettie Faye Duckworth Warren, administratrix of the Estate of James B. Duckworth, brought suit in the Tenth Judicial Circuit Court of Alabama against St. Louis-San Francisco Railway Company, Burlington Northern Railway Company (the

"Railroad"), and Kershaw Manufacturing Company ("Kershaw"). Burlington Northern is successor corporation to St. Louis-San Francisco Railway Company. Plaintiff alleges in her complaint that her deceased husband was killed while working as a laborer for the Railroad. Plaintiff alleges that his death was proximately caused by the negligence of the Railroad and that the action is brought pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C. §51, et seq. (FELA). The complaint avers that Kershaw is liable under the provisions of the Extended Manufacturer's Liability Doctrine. She further avers that on January 2, 1980, a consent judgment was entered in the case of *Nettie Faye Duckworth v. St. Louis-San Francisco Railway Company and Kershaw Manufacturing Company*, CV-80-02, in the Circuit Court of Walker County, Alabama, for the amount of $151,500.00, and that such judgment was procured by fraud on the part of the Railroad and Kershaw and is thus null and void. (Appendix A&B)

The Railroad moved to dismiss her complaint alleging that fraud had not been stated with particularity. It also filed a Motion to Transfer to Equity alleging that an independent action to set aside an earlier "judgment" is an equity action. (Appendix C). On May 12, 1982, the trial court granted the Motion to Dismiss. Plaintiff filed an amended complaint. (Appendix B) On January 28, 1983, the Court granted the Railroad's Motion to Transfer to the Equity Division. (Appendix D) Subsequent to the transfer to the Equity Division, the Railroad filed a Motion to Strike Plaintiff's Jury Demand on the ground that the plaintiff was not entitled to a jury in this equity action to set aside a final judgment. (Appendix E) On June 15, 1984, Judge Marvin Cherner issued a Pre-trial Order containing a well reasoned Opinion denying the Motion to Strike the Jury Demand. (Appendix F) The Railroad filed a Petition for Mandamus with the Supreme Court of Alabama. On January 4, 1985, the Alabama Supreme Court denied the Petition for Mandamus. On January 18, 1985, Petitioner filed a Petition for Rehearing, which was denied by the Alabama Supreme Court on May 10, 1985. (Appendix G&F) This brief

supplements the Alabama Supreme Court's written Opinion, the Opinion of Trial Judge Marvin Cherner, and submits supporting arguments that the Opinion of the Alabama Supreme Court was a correct application of the law.

REASONS FOR DENYING THE WRIT

Nettie Faye Duckworth Warren's action seeking to set aside a fraudulently obtained consent judgment is a FELA claim brought in state court. This case presents a conflict between state court rules and this federal statutory remedy. Alabama law provides that an action to set aside a judgment is an equitable proceeding which must be tried before a court without a jury. The federal statute under which Mrs. Warren brings her claim provides a FELA claimant the right to a jury trial on all factual issues. This Court has protected a FELA claimant's right to a jury trial from the application of local rules of procedure in its decision of *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312 (1952). The Alabama Supreme Court correctly interpreted *Dice* in its decision to protect Mrs. Warren's right to trial by jury on the issue of the consent judgment's validity.

1. Alabama equity law does not apply.

In *Dice*, this Court did not allow Ohio equity law to deprive a FELA claimant of his right to a jury trial on the issue of a fraudulently obtained release. Dice, while working as a railroad fireman, was seriously injured when the engine in which he was riding jumped a track. He brought suit in a FELA action and the Railroad asserted the defense that Dice had executed a release whereby he released the Railroad of all claims. Ohio laws treat an attack on a release as an equitable action, not triable by a jury. This Court concluded that in a FELA claim, the plaintiff is entitled to a jury trial on the issue of the release's validity as well as all other factual issues. This Court emphasized that the right to a jury trial is a fundamental right afforded to injured railroad employees and their surviving de-

pendents under the FELA and has long been recognized as part and parcel of the FELA remedy itself. *Dice* at 363; *Bailey v. Central Vermont Railway,* 319 U.S. 350, 63 S. Ct. 1062, 87 L.Ed. 1444 (1943).

This Court in *Dice*, recognized that:

> To deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' Id. at 363.

In *Bailey*, this Court stated:

> To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. Id. at 354.

This issue was put to rest in *Dice* when this Court held:

> It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial . . . Id. at 363.

In *Dice,* this Court adheres to the principle that the right to a jury trial is part and parcel of the FELA claimant's remedy. Therefore, crucial issues arising in the course of litigation shall be tried before a jury as part of the remedy afforded by the FELA. Any procedural rule which deprives the claimant of the right shall not be applied.

This Court is emphatic in *Dice* that a state court cannot split a FELA action so that issues of fraud are decided by a judge and issues of negligence are decided by a jury. The Court commented that Ohio could eliminate the right to a jury trial in all FELA actions only by eliminating the right to a jury trial in all negligent cases arising under common law or FELA. The Court continued by stating:

> But Ohio has not done this. It has provided jury trials for cases arising under the Federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than a jury. *Dice* at 363.

This Court has emphatically stated in its decision of *Dice*, that "state laws are not controlling in determining what the incidents of this federal right shall be." Id. at 361. *Chesapeake & Ohio R. Co. v Kuhn*, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157 (1931); *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759 (2nd Cir. 1946). Likewise, Alabama equity law cannot be applied to deprive a FELA claimant of his federal right to a jury trial.

2. Federal law requires a jury trial in FELA cases.

Petitioner argues that neither state law nor federal common law requires a jury trial. The Railroad cites *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238 (1944) to support its argument that federal common law does not require a jury trial to set aside a fraudulent judgment. However, *Hazel-Atlas* is not relevant to the instant case because it is brought under federal patent laws, not under the FELA. This distinction is the determining factor in the *Dice* decision with which the Alabama Supreme Court complied. The crux of the *Dice* decision, is that in a *FELA* claim, the plaintiff's right to a jury trial will not be abolished by state equity practice. This Court did not allow the determination of these issues to be split between a judge and jury. Likewise, the Alabama Supreme Court will not allow the determination of a fraudulent consent judgment and other issues of negligence to be split between a judge and jury. To do so would be in direct contradiction of *Dice*.

3. This FELA action is not barred by the principles of res judicata.

Petitioner argues that the principles of res judicata are invoked by a consent judgment; therefore, plaintiff's FELA action is barred. However, Petitioner ignores an underlying principle of this doctrine. A judgment obtained by fraud or collusion may not be used as the basis for its application. The principles of res judicata may not be invoked to sustain fraud. *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669

(1928). The Alabama courts have adhered to this principle and will not apply the doctrine so as to deny "justice or deprive a litigant of a righteous claim." *Krasner v. Reed*, 30 So.2d 731, 734, 33 Ala. App. 85, pet. for cert. dismissed 30 So.2d 734, 249 Ala. 240 (1947).

This consent judgment does not represent the culmination of litigation or of a lawsuit previously filed by Mrs. Warren. Mrs. Warren was told by the claim agent that $151,500.00 was the total amount that she could collect from the defendant. The claim agent then took Mrs. Warren to the office of the Burlington Northern Railroad's attorney, who then prepared a complaint to be signed by Mrs. Warren as plaintiff. After the complaint was prepared, defendant's claim agent and attorney escorted Mrs. Warren to the courthouse where the release was reduced to a consent judgment. Mrs. Warren was never informed of the Railroad's liability under the FELA or of the remedy afforded her under the FELA. This judgment is no more than a fraudulent release that the Railroad's claim agents and attorneys cleverly had reduced to a final judgment. Therefore, the judgment does not bar a subsequent FELA suit which seeks to vacate the consent procured by fraud and to provide to the plaintiff the remedy to which she is entitled under the FELA. The Railroad cannot defraud a plaintiff of her rightful claim and then hide behind res judicata to enforce the fraud.

4. Consent judgments and releases are treated identically under the FELA.

The Railroad argues that consent judgments are distinguishable from releases; therefore, *Dice* does not apply to the instant case. However, the two devices are identical in purpose and substance. Both a fraudulent release and a fraudulent consent judgment would be attacked in equitable proceedings under Alabama law in non FELA cases. Although the validity of these devices would be issues for a judge to determine under Alabama law, the validity of a release and a consent judgment are issues for a jury to determine under the principles of *Dice*.

Equity practice in Ohio was, prior to *Dice,* identical to that of Alabama. The Railroad seeks to invoke Alabama's equity practice in denying plaintiff's right to trial by jury. That is precisely what Ohio attempted to do in *Dice.* However, Alabama's equity practice is no more sacred than that of Ohio. The Alabama Supreme Court correctly followed *Dice* in its determination that Alabama's court rules may not deprive a FELA claimant of the right to a jury trial on all factual issues.

5. Title 45 U.S.C. §55 guarantees a FELA claimant a right to trial by jury in this instance.

Petitioner argues that the Alabama Supreme Court gives the FELA an unique position and that "to accord such a status to FELA cases would require at a minimum congressional intent to require juries in this setting." However, Petitioner fails to cite Title 45 U.S.C. §55. It reads in pertinent part:

> Any contract, rule, regulation, or *device whatsoever,* the purpose or intent of which is to enable any common carrier to exempt itself from liability created by this chapter shall to that extent be void . . . (Emphasis supplied).

This statute protects employees and their surviving dependents from any and all methods which a railroad might employ with the intent to escape any measure of its liability under the Act. In keeping with the congressional intent, 45 U.S.C. §55 has been relied upon to declare fraudulently obtained settlements and releases void. *Duncan v. Thompson,* 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942).

The scope of this statute is broad and must be read as such if the Act is to accomplish its humanitarian purpose. *Urie v. Thompson,* 337 U.S. 181, 182, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R. 2d 252 (1949). The section is not limited to fraudulently obtained statements and releases but forbids "any device whatsoever" which is intended to escape liability under the Act. This point is made clear in *Dice, supra,* in which this Court stated:

> Releases and *other devices* designed to liquidate or defeat injured employees' claims play, an important part in the

> Federal Acts Administration. Compare *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law. 342 U.S. at 361-62 (Emphasis supplied).

Respondent submits that the use of the term "device whatsoever" and "other devices" by the United States Congress and this Court evinces congressional intention to cover *all* liability escaping measures. If Congress wished only to prohibit contractual releases, the words "device whatsoever" would be meaningless and superfluous.

It is the term "device whatsoever" that expands Title 45 U.S.C. §55's coverage beyond releases to include every measure or connivance which the Railroad might use in an attempt to escape liability. This includes the measures used by the Railroad against Nettie Faye Duckworth Warren. The scam used against Mrs. Warren was not a judgment that she obtained representing the culmination of litigation or the product of a lawsuit in which her interests were completely advocated. It is no more than a product of the Railroad's imagination, manipulation, misrepresentations and fraud and therefore a "device" prohibited by Title 45 U.S.C. §55. As has been briefed fully heretofore, a FELA plaintiff is entitled to a jury trial on the issue of whether Title 45 U.S.C. §55 was violated by the Railroad's use of such a "device". *Dice, supra.*

The argument of the Railroad in this case totally ignores the congressional intent shown in §55 and supplants that intent with a theoretical and erroneous argument that would allow railroads to settle every FELA claim by consent judgment and thereby totally avoid the intent of Congress in enacting §55 and totally avoid the rationale of the Supreme Court of the United States' opinion in *Bailey v. Central Vermont Railroad*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943), *Dice, supra,* and other cases stating that the right to a jury trial is part and parcel of the FELA law. *Dice* says this includes Title 45 U.S.C. §55.

If *Dice, Bailey,* and §55 are not enforced by this Court, every

release of a future FELA claim will be by consent judgment and there will be no such thing as a jury trial to determine whether or not the consent judgment in question was a "device . . . the purpose or intent of which" was to enable a railroad to exempt itself from any liability created by the FELA. Uniformity of application of FELA law by the various state courts would crumble and the rationale of §55 and *Dice,* as well as *Brown v. Western Railway of Alabama,* 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949) would be ignored.

CONCLUSION

This Court has consistently protected the FELA claimant's right to a trial by jury. *Bailey* at 354; *Brown* at 294; *Dice* at 359. The decision of the Alabama Supreme Court is consistent with the precedent set in the cases cited above. A jury trial is a substantive right of the FELA claimant. The Alabama Supreme Court was correct in its analysis of *Dice.* A fraudulent release and a fraudulent consent judgment would be attacked in equity proceedings under Alabama law in a non FELA context. *Dice* requires a jury trial for an attack on a release in a FELA case, therefore, a jury trial is required for an attack on a consent judgment in a FELA case. The Alabama Supreme Court correctly concluded that to deny this basic right of trial by jury violated the dictates of the United States Supreme Court.

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1230 First Ala. Bank Bldg.
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205-251-9729

Attorneys for Respondent,
Hon. Marvin Cherner, Judge
of the Tenth Judicial
Circuit of Alabama

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

NETTIE FAYE DUCKWORTH WARREN, Administratrix of the Estate of JAMES B. DUCKWORTH, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, and Danny Duckworth, the totally dependent minor children of JAMES B. DUCKWORTH, Deceased, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV81-4859
ST. LOUIS — SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, and KERSHAW MANUFACTURING COMPANY, INC., a corporation, Defendants.	)	

SUMMONS

To Any Sheriff in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendants St. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, and KERSHAW MANUFACTURING COMPANY, INC., a corporation.

Each defendant is required to serve a written answer to the complaint upon Scott A. Powell, attorney of record for the plaintiff, whose address is 1620 First Alabama Bank Building, Birmingham, Alabama 35203-3269, within thirty (30) days after service of this summons with the exclusion of the day of service, and to file the original of the said written answer with the clerk of the court within the said thirty day period. If any defendant fails to do so, a judgment by default may be entered against that defendant for the relief claimed in the complaint.

DATED: November 12, 1981

/s/ POLLY CONRADI

Clerk of the Court

COMPLAINT

1. The plaintiff is the totally dependant surviving widow of JAMES B. DUCKWORTH, deceased, and sues in her capacity as administratrix of the estate of JAMES B. DUCKWORTH, deceased and for her benefit as said totally dependent surviving widow. Plaintiff also sues for the benefit of Anita Duckworth, a minor sixteen (16) years of age, Randy Duckworth, a minor twelve (12) years of age, Bobby Duckworth, a minor ten (10) years of age, and Danny Duckworth, a minor four (4) years of age, who are the totally dependant surviving minor children of JAMES B. DUCKWORTH, deceased.

2. At all times referred to herein the plaintiff was an employee of the defendant and was working within the line and scope of his employment for the defendant. At all times referred to herein the defendant was a common carrier by railroad engaged in the business of operating a railroad in interstate commerce for hire for the purpose of carrying freight and passengers in interstate commerce. At all times referred to herein the plaintiff's duties of employment for the defendant were in the furtherance of such interstate

commerce or directly or closely and substantially affected such interstate commerce. This action is brought under and by virtue of the provisions of the Federal Employers Liability Act, Tit. 45, U.S.C.A., § 51, et seq.

3. Plaintiff avers that heretofore, on to-wit, the 21st day of December, 1978, JAMES B. DUCKWORTH, deceased, was working as a laborer for the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, successor corporation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, at or near Tupelo, Mississippi, when a bush hog operating nearby on the tracks and roadbed of the defendant, caused a wire to be thrown out of the unguarded portion of the blade, striking JAMES B. DUCKWORTH in the throat with such force that he was so severely injured that on, to-wit, the 26th day of December, 1978, he died.

4. Plaintiff avers that JAMES B. DUCKWORTH, deceased, was killed as a proximate result, in whole or in part, of the negligence of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, the successor corporation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, its agents, servants or employees, while acting within the line of scope of their employment for the defendant or by reason of a defect or insufficiency due to its negligence in its roadbed, tracks, bush hogs, safety practice, work practices, guards, guards on bush hogs, absence of guards on bush hogs, absence of warning signs on bush hogs warning JAMES B. DUCKWORTH of the inherent danger attendant with the operation of said bush hog.

5. Plaintiff further avers that the death of JAMES B. DUCKWORTH was proximately caused, in whole or in part, by the negligent failure of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, to use reasonable care to provide to JAMES B. DUCKWORTH, a reasonably safe place for him to do his work and labor for the defendant on the occasion of sustaining the injuries which resulted in his death.

6. Plaintiff further avers that the death of JAMES B. DUCKWORTH, was proximately caused, in whole or in part, by the negligent failure of the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, to provide guards on its bush hog machines when they knew or in the exercise of reasonable care should have known that said machine created an ultar-hazardous work situation and work station for the deceased, James B. DUCKWORTH, but negligently failed to provide a guard around the machine proximately resulting in JAMES B. DUCKWORTH'S death.

7. Plaintiff further avers that heretofore, prior to December 21, 1978, the defendant, the KERSHAW MANUFACTURING COMPANY, INC., a corporation, manufactured this bush hog and plaintiff avers that the said defendant negligently breached the extended manufacture's liability doctrine of the State of Alabama and that the bush hog was not safely guarded and that said bush hog was negligently designed and negligently manufactured without said guarding attachment. Plaintiff further avers that bush hog was negligently manufactured and negligently sold to the defendant, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation.

8. Plaintiff avers that as a proximate consequence of the said negligent breach of the extended manufacture's liability doctrine of the State of Alabama, the said defendant, KERSHAW MANUFACTURING COMPANY, INC., a corporation, directly and proximately contributed to the death of her said husband as aforesaid.

9. Plaintiff further avers that her said husband's death was proximately caused by the combined and concurring negligence of all defendants at the aforesaid time and place in the negligent manner as heretofore stated in this complaint as to all defendants.

10. Plaintiff further avers that heretofore, on to-wit, the 2nd day of January, 1980, a judgment was entered in the case of NETTIE FAYE DUCKWORTH, v. ST. LOUIS -

SAN FRANCISCO RAILWAY COMPANY and KERSHAW MANUFACTURING COMPANY in the amount of one hundred fifty-one thousand five hundred dollars ($151,500). Plaintiff further avers that said judgment is null and void in that said judgment was procured by fraud on the part of the defendants, its agents, servants or employees while acting within the line of scope of their employment for the defendants. Plaintiff further avers that said judgment is null and void and that said judgment does not provide any allocation or distribution for the deceased minor children pursuant to Federal statutes.

11. As damages, plaintiff claims of the defendants the sum of five million dollars ($5,000,000.00) for the benefit of herself as the surviving dependant widow of JAMES B. DUCKWORTH, deceased, and for the benefit of her four minor children as totally dependant surviving children of JAMES B. DUCKWORTH, deceased.

12. Plaintiff demands trial by struck jury.

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(205) 251-9729

BY: /s/ SCOTT A. POWELL
SCOTT A. POWELL

TRIAL COUNSEL: Frank O. Burge, Jr.
Scott A Powell

PLAINTIFF'S ADDRESS:
Route 1
Guin, Alabama 35563

DEFENDANT'S ADDRESS:

BURLINGTON NORTHERN, INC.
Vastine Stabler, Jr.
1900 First National-Southern Natural Bldg.
Birmingham, Alabama 35203-3269

KERSHAW MANUFACTURING COMPANY
Donald C. Bailey
2205 West Fairview Avenue
Montgomery, Alabama 36108

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
30 South 18th Street
Birmingham, Alabama 35233

APPENDIX B

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA.

NETTIE FAYE DUCKWORTH WARREN, etc.,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. CV-81-4859
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, et al.,	)	
Defendants.	)	

PLAINTIFF'S FIRST AMENDMENT TO COMPLAINT

Plaintiff amends her complaint heretofore filed as follows:

1. By adding the following averment to paragraph 10 of plaintiff's complaint:

Plaintiff avers that the aforesaid fraud of the defendant was perpetrated upon the plaintiff by the defendants' claim agent who made misrepresentations which were relied on as being true by the plaintiff but which in fact were untrue as a result of which plaintiff was damaged.

The said claim agent represented to the plaintiff that plaintiff did not need a lawyer to explain to her her rights or to handle her claim for her because he, the claim agent of the St. Louis-San Francisco Railway Company, would handle everything for her and for her children with the St. Louis-San Francisco Railway Company. The said representation was untrue in that the said claim agent never explained to the plaintiff her rights against the St. Louis-San Francisco Railway Company or against Kershaw Manufacturing Company; he never explained to the plaintiff the Federal Employers Liability Act and in fact never mentioned

the Federal Employers Liability Act to the plaintiff; the said claim agent never mentioned to the plaintiff that loss of contributions from her deceased husband was an item of damage under the Federal Employers Liability Act; the said claim agent never mentioned to the plaintiff that loss of parental guidance of plaintiff's children was an item of damage under the Federal Employers Liability Act; the said claim agent never mentioned to the plaintiff that conscious pain and suffering of her deceased husband during his life time subsequent to his injury and prior to his death was an item of damage under the Federal Employers Liability Act; that Kershaw Manufacturing Company was subject to the Manufacturer's Liability Doctrine of the State of Mississippi; the law of damages as it applied to Kershaw Manufacturing Company and plaintiff and her children was never mentioned to the plaintiff by the said claim agent; the said claim agent never mentioned to the plaintiff that there must be an allocation of total damages between plaintiff as the surviving dependent widow and her children as the surviving dependent children of the deceased husband and father; the said claim agent never told the plaintiff what any investigation disclosed as to the cause of her husband's injury and the negligence of the railroad and the negligence of Kershaw Manufacturing Company except to tell the plaintiff that the accident was caused by her husband's own fault.

The said claim agent represented to the plaintiff that he would work in her best interest and in the best interest of her children in handling her claim against the railroad company if she would not get a lawyer. The said claim agent did not work in the best interest of the plaintiff and her children in that he had her settle the case for One Hundred Fifty One Thousand Five Hundred Dollars ($151,500.00) which was substantially less than plaintiff and her children were entitled under the existing law and facts of the case; the said claim agent had a conflict of interest between representing the plaintiff as he told plaintiff he would do at a time when he was working for the defendant St. Louis-San Francisco

Railway Company and the defendant Kershaw Manufacturing Company; the said claim agent used the first person plural "we" when discussing his efforts on behalf of plaintiff and her children against the railroad company; the said claim agent used the third person "they" and "them" when referring to his employer the St. Louis-San Francisco Railway Company; the said claim agent never explained and working as a claim agent for the defendant St. Louis-San Francisco Railway Company and Kershaw Manufacturing Company; when plaintiff protested that One Hundred Fifty Thousand Five Hundred Dollars $151,500.00) was not a sufficient amount of money for her loss the said claim agent said that was all "we" can get and "they" will not pay any more referring to himself and the plaintiff as "we" and referring to the St. Louis-San Francisco Railway Company as "they".

Plaintiff did not understand the papers that were signed at the company's lawyer's office which led to a judgment being taken but signed the documents and allowed the judgment to be taken because the said railroad claim agent told her she was getting all that she was entitled to get and that he had worked it out for her in the best interest of her and her children and he was handling everything for her so she would not have to have a lawyer and pay a lawyer.

No allocation was ever made for plaintiff's minor children who were totally dependent upon their deceased father James B. Duckworth for support during the life time of the said James B. Duckworth.

Plaintiff avers that the aforesaid misrepresentations of material facts were relied on by the plaintiff in her dealings with the said railroad claim agent to her detriment and damage and were material misrepresentations which misled her to her detriment.

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1620 First Alabama Bank Building
Birmingham, Alabama 35203-3269
(205) 251-9729

By: /s/ FRANK O. BURGE, JR.
Frank O. Burge, Jr.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 25th day of May, 1982, served a copy of the foregoing pleading on counsel for all parties concerned by hand delivery.

/s/ FRANK O. BURGE, JR.
Frank O. Burge, Jr.

APPENDIX C

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

NETTIE FAYE DUCKWORTH WARREN, Administratrix of the Estate of JAMES B. DUCKWORTH, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, and Danny Duckworth, the totally dependent minor children of JAMES B. DUCKWORTH, deceased,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. CV-81-4859
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, BURLINGTON NORTHERN RAILWAY COMPANY, a corporation, and KERSHAW MANUFACTURING COMPANY, INC., a corporation,	)	
Defendants.	)	

MOTION TO DISMISS OR IN THE ALTERNATIVE TO TRANSFER TO EQUITY DIVISION

Comes now the defendant, Burlington Northern Railway Company, a corporation, which is the successor corporation to St. Louis-San Francisco Railway Company and moves this Court to dismiss this action. In support of this motion, defendant says as follows:

1. The complaint fails to state a claim upon which relief can be granted.

2. The basis for setting aside the earlier judgment rendered between these parties is alleged to be "fraud" by the defendants, but the plaintiff fails to state with particularity the circumstances constituting fraud as required by Rule 9(b), Ala. R. Civ. P.

In the alternative, the defendant moves this Court to transfer this action to equity division. In support of this motion, defendant says as follows:

1. Plaintiff in this cause of action filed suit against the defendants in this cause of action in the Circuit Court of Walker County, Alabama.

2. An order was issued on January 2, 1980 by the Circuit Court of Walker County approving settlement of the case and entering judgment against St. Louis-San Francisco Railway Company in the sum of $111,500.00 and against Kershaw Manufacturing Company, Inc. in the amount of $40,000.00. Said judgment is attached hereto as Exhibit A.

3. The total amount of the judgment ($151,500.00) has been paid by the defendants to the plaintiff.

4. Plaintiff now seeks in this independent action to set aside the judgment over one and one-half years ago by another court.

5. An independent action filed to set aside an earlier judgment under Rule 64, Ala. R. Civ. P., is an equity action. *Denton v. Stanford*, 383 So. 2d 847, 848 (Ala. Civ. App. 1980) (holding that "This is an independent action in equity for relief from a judgment"); *Battle v. Morris*, 265 Ala. 851 (1957) (original bill filed in equity to set aside a consent judgment rendered in favor of plaintiff on the law side of the circuit court); *Bankers Mortgage Company v. United States*, 423 F.2d 73, 78 (5th Cir. 1970) *cert. denied* 399 U.S. 927 (1970) (holding that " 'independent action' as used in [Rule 60(b)] was meant to refer to a procedure which has been historically known simply as an *independent action in equity* to obtain relief from a judgment"); 7 J. Moore,

Moore's Federal Practice ¶ 60.36 ("The original bill or independent action, to impeach for *fraud* . . . is founded upon an independent and substantive *equitable* jurisdiction"). Therefore, the Equity Division has exclusive jurisdiction over plaintiff's cause of action and any further proceedings should be conducted in that forum.

/s/ LEE E. BAINS, JR.

/s/ L. VASTINE STABLER, JR.

Attorneys for Defendant,
Burlington Northern Railroad
Company, a corporation

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

NOTICE OF HEARING

PLEASE TAKE NOTICE that hearing on the above and foregoing motion will be had before the Presiding Judge of this Honorable Court on Wednesday, January 13, 1982 at 10:00 a.m. *ORAL ARGUMENT REQUESTED.*

/s/ L. VASTINE STABLER, JR.

OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing motion to dismiss or in the alternative to transfer to equity division has been duly served upon counsel for plaintiff by mailing same to Mr. Scott Powell, 1620 First Alabama Bank Building, Birmingham, Alabama 35203, this the 21st day of December, 1981.

/s/ L. VASTINE STABLER, JR.
OF COUNSEL

TRIAL COUNSEL:

L. Vastine Stabler, Jr.
Michael C. Quillen
Lee E. Bains, Jr.

APPENDIX D

JOHN N. BRYAN, JR.
Circuit Judge
Tenth Judicial Circuit
of Alabama
303 County Courthouse
Birmingham, Alabama 35203
January 28, 1983

Mr. Frank O. Burge, Jr.
Attorney at Law
1620 First Alabama Bank Bldg.
Birmingham, Alabama 35203

Mr. L. Vastine Stabler, Jr.
Cabaniss, Johnston, Gardner,
Dumas & O'Neal
1900 First National-Southern
Natural Bldg.
Birmingham, Alabama 35203

Mr. Jack J. Hall
Suite 725
First Alabama Bank Building
Birmingham, Alabama 35203

Re: Case No. CV 8104859
Nettie Faye Duckworth Warren
vs
St. Louis-San Francisco Railway
Co., et al

Gentlemen:

The Court this date entered the following order on the motion to transfer to equity division:

"January 28, 1983. On October 14, 1983, this court heard the routine motion docket. The motions to transfer this

case to the equity division were heard by this court. The plaintiffs' attorney and the defendants' attorneys briefly argued the points and each was granted two weeks in which to submit briefs in support of and in opposition to said transfer of equity. To date, the court has received no further briefs in opposition to the transfer, therefore, the court directs that this case be transferred to the equity division of this court. This order of transfer is without prejudice to the equity judge assigned this particular case. In the event said judge is satisfied that this case is inappropriate for equitable relief, then said judge may transfer the case back to the law side."

Yours truly,

/s/ JOHN N. BRYAN, JR.

Presiding Judge

APPENDIX E

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
(EQUITY DIVISION)

NETTIE FAYE DUCKWORTH WARREN, Administratrix of the Estate of JAMES B. DUCKWORTH, who sues on her behalf as totally dependent surviving widow and on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth, and Danny Duckworth, the totally dependent minor children of JAMES B. DUCKWORTH, deceased, Plaintiff,	)	CIVIL ACTION NO. CV-83-500-457-WAT
vs.	)	
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY a corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a corporation; and KERSHAW MANUFACTURING COMPANY, INC. a corporation, Defendants.	)	

MOTION TO STRIKE

Comes now the defendant, Burlington Northern Railroad Company, a corporation, which is the successor corporation to St. Louis-San Francisco Railway Company, and moves this Court to strike plaintiff's jury demand. In support of this motion, defendant says as follows:

1. Plaintiff seeks in this independent action to set aside

the judgment rendered for plaintiff and against defendants over three years ago by Circuit Court of Walker County.

2. An independent action filed to set aside an earlier judgment under Rule 64, Ala. R. Civ. P., is an equity action. *Denton v. Stanford*, 383 So. 2d 847 (Ala. Civ App. 1980) (holding that "This is an independent action in equity for relief from a judgment"); *Battle v. Morris*, 265 Ala. 851 (1957) (original bill filed in equity to set aside a consent judgment entered in favor of plaintiff on the law side of the circuit court); *Bankers Mortgage Company v. United States*, 423, F.2d 73, 78 (5th Cir. 1970), *cert. denied*, 399 U.S. 927 (1970) (holding that " 'independent action' as used in [Rule 60(b)] was meant to refer to procedure which has been historically known simply as an *independent action in equity* to obtain relief from a judgment"); 7 J. Moore, *Moore's Federal Practice* ¶ 60.36 ("The original bill of independent action, to impeach for *fraud* . . . is founded upon an independent and substantive *equitable* jurisdiction").

3. This independent action was brought on the law side of the Jefferson County Circuit Court. On January 28, 1983, Judge Bryan granted defendants' motion to transfer this case to the equity division.

4. Plaintiff is not entitled to a jury in this equity action to set aside a final judgment.

/s/ L. VASTINE STABLER, JR.

/s/ LEE E. BAINS, JR.

Attorneys for Defendant,
Burlington Northern Railroad
Company, a corporation

OF COUNSEL:
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing on the above and foregoing Motion to Strike will be had before the Honorable William A. Thompson on Wednesday, September 21, 1983 at 8:30 a.m.

/s/ LEE E. BAINS, JR.
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Strike has been duly served upon all counsel by hand-delivering same to Mr. Scott Powell, 1620 First Alabama Bank Building, Birmingham, Alabama 35203, and to Mr. Doug Martin, 725 First Alabama Bank Building, Birmingham, Alabama 35203, this the 9th day of September, 1983.

/s/ LEE E. BAINS, JR.
OF COUNSEL

APPENDIX F

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

NETTIE FAYE DUCKWORTH WARREN, as Administratrix of the Estate of James B. Duckworth, who sues on her own behalf as the dependent surviving widow of James B. Duckworth and who also sues on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth and Danny Duckworth, the dependent minor children of James B. Duckworth, deceased, Plaintiff,	)	
v.	)	Civil Action No. CV-81-4859
BURLINGTON NORTHERN RAILROAD COMPANY, a corporation (successor corporation to St. LOUIS, San Francisco Railway Company, a corporation; and KERSHAW MANUFACTURING COMPANY, INC., a corporation, Defendants.	)	

PRE-TRIAL ORDER

1. *Counsel.* Counsel for the plaintiff, Nettie Faye Duckworth Warren, are Frank O. Burge and Scott A. Powell. Counsel for the defendant, Burlington Northern Railway Company (successor to St. Louis-San Francisco Railway Company), is Vastine Stabler. Counsel for the defendant, Kershaw Manufacturing Company, Inc., a corporation, is Jack J. Hall.

2. *Duties.* Plaintiff is Nettie Faye Duckworth Warren who sues on her own behalf as the dependent surviving widow of James B. Duckworth, deceased, and who also sues on behalf of Anita Duckworth, James Randy Duckworth, Bobby Duckworth and Danny Duckworth, as the dependent minor children of James B. Duckworth, deceased. (For convenience, this plaintiff will be referred to as "Nettie Faye Warren" or "Warren"). Defendants are Burlington Northern Railway Company, a corporation ("Burlington"), and Kershaw Manufacturing Company, Inc., a corporation ("Kershaw").

3. *Pleadings.* The following pleadings have been allowed:

A. Complaint and amended complaint on behalf of Nettie Faye Warren.

B. Answer and amended answer by Kershaw. Burlington has not filed an answer and is hereby directed to file an answer in accordance with the provisions of Rule 8(b) of the Alabama Rules of Civil Procedure within twenty days from the date of this order.

4. *Prior Motions.* The following motions were heard and disposed of as hereinafter indicated:

A. Motion by Burlington to transfer to the Equity Division was granted.

B. Motion by Kershaw to transfer to the Equity Division was granted.

By order entered October 28, 1983, this case was remanded and re-transfered to the Civil Division for further proceedings and specially assigned to this Court.

5. *Pending Motions.* The following motions are now pending and the following action is taken with respect to such motions:

A. Motion by Burlington to dismiss.

In support of its motion, Burlington has submitted a copy of a final judgment rendered in the Circuit Court of Walker County, Alabama, CA # CV-80-02 on January 1, 1980 awarding Nettie Faye Warren the sum of $111,500 against Burlington and the sum of $40,000 against Kershaw.

In the first amendment to her complaint, Nettie Faye Warren asserts that she was induced to agree to the judgment entered in her favor from the Circuit Court of Walker County, Alabama by representations made to her by the defendants upon which she relied to her detriment and that the representations were false. Nettie Faye Warren therefore seeks to vacate and set aside the judgment as being obtained as result of the frauds practiced on her by Burlington.

Since Nettie Faye Warren has challenged the judgment by the allegations of her complaint, the complaint may not be dismissed. Accordingly, the motion to dismiss filed by Burlington is hereby overruled.

B. Motions by Burlington and Kershaw to strike jury demand.

In the first amendment to her complaint, Nettie Faye Warren alleges that the judgment rendered in her favor and against Burlington and Kershaw by the Circuit Court of Walker County, Alabama in Civil Action CV-80-02, was obtained by fraud. She seeks now in an independent action in this Court to set aside the judgment. Rule 60(b) of the Alabama Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . this rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three years after the entry of the judgment . . . to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. . .

In Alabama, an independent action brought to set aside or vacate a judgment procurred by fraud, accident or mistake, is in the nature of an equitable remedy. In *Maddox v. Hunt*, 281 Ala. 335, 202 So.2d 543 (1967), an independent

action had been brought by the plaintiff seeking to set aside a judgment obtained by default. Speaking to the general principles involved and to the nature of the remedy, the Supreme Court of Alabama stated in its opinion the following:

> Courts of equity will set aside and vacate judgments procurred by fraud, accident, or mistake, and without negligence on the part of the complainant, if the complainant has a meritorious defense. *Barrow v. Lindsey*, 230 Ala. 45, 159 So. 232; *St. John v. Campbell*, 250 Ala. 380, 34 So.2d 584.
>
> However, as stated in *Hendley v. Chabert*, et al., 189 Ala. 258, 65 So. 993, this equitable power to set aside a judgment of another court is of great strictness, otherwise equity courts would supplant the jurisdiction of all other courts. A due regard for the interests and caution in the exercise of the power of equity to set aside judgments.

Where the plaintiff's claim is equitable in nature, there is no right to a jury trial. It is true that Rule 38(a) of the Alabama Rules of Civil Procedure states that the right of trial by jury is declared by the Constitution of Alabama shall be preserved to the parties inviolate. However, this rule only means that the right to jury trial is preserved as it was known in Alabama before the adoption of the Alabama Rules of Civil Procedure. The Committee Comments to Rule 38(a) make this clear:

> Subdivision (a) is identical with Constitution 1901, ¶ 11, and thus preserves the right to jury trial precisely as it has been known heretofore in Alabama. See generally, Jones, Trial by Jury in Alabama, 8 Ala. L. Rev. 274 (1956). Because law and equity are now to be merged, there will be cases in which issues to be tried to the jury are combined with issues to be tried to the court. But the basic test is clear: If an issue is of a sort which heretofore would have been tried to a jury, then the party has a Constitutional right, expressly reaffirmed by Rule 38(a), to have it tried to a jury under the merged procedure. . .

The Supreme Court of Alabama has continued to construe Rule 38(a) as only giving the right to jury trial in those cases where such right existed prior to the adoption of the Alabama Rules of Civil Procedure. For example, actions seeking the cancellation or reformation of a written instrument are considered to be equitable in nature so that the parties are not entitled to a jury trial. See, e.g., *Richey v. Creel,* 437 So.2d 554 (Ala. 1983); *Johnson v. Brown,* 437 So.2d 1273 (Ala. 1983); *Holloway v. Nationwide Mut. Ins. Co.,* 376 So.2d 690 (Ala. 1979).

If Nettie Faye Warren's action seeking to set aside the judgment previously entered by the Circuit Court of Walker County involved state law, she would not be entitled to a jury trial. However, her claim is brought under the Federal Employer's Liability Act (F.E.L.A.) and her action is therefore governed by federal law rather than state law. *New York Central, etc. R. Company v. Tonsellito,* 244 U.S. 360 (1917).

In support of their motions to strike the jury demand made by Nettie Faye Warren, Burlington and Kershaw argue that federal law is applicable only to substantive legal issues involving Nettie Faye Warren's rights under F.E.L.A. and that all procedural issues are still governed by state law.

It is true that appellate courts in a number of decisions have made the differentiation between substantive and procedural issues and have applied state law to decide the latter. The difficulty however, is in trying to determine when a particular issue involves procedural law rather than substantive law. See, *Ely, The Irrepressible Myth of Erie,* 87 Harvard L. Rev. 693 (1974); *Chayes and Ely, Some Further Last Dords on Erie, The Bead Game, The Necklace,* 87 Harvard L. Rev. 741 (1974).

In *Hanna v. Plumer,* 380 U. S. 460 (1965), the U. S. Supreme Court held that the mode of obtaining service of process by a plaintiff filing a suit in federal court was governed by the Federal Rules of Civil Procedure and not by state law governing service of process. In that case, Massa-

chusetts required the complaint to be served in person on the executor of an estate while Rule 4(d)(1) of the Federal Rules of Civil Procedure permitted service by leaving a copy with an individual at the defendant's usual place of abode. The Supreme Court determined that method of service involved procedural law rather than substantive law so that service of process would be governed by the federal rules.

In *Sibbach v. Wilson & Company*, 312 U. S. 1 (1941), Mrs. Sibbach, a plaintiff, refused to submit to physical examination for purposes of discovery by the defendant although ordered to do so by the federal court. She lived in Illinois. Under Illinois law, a defendant was not able to obtain an order requiring a plaintiff to submit to physical examination. The U. S. Supreme Court rejected Mrs. Sibbach's contention on appeal that the issue whether she was required to submit to physical examination involved substantive rights and should therefore be governed by Illinois law. The U. S. Supreme Court stated:

> . . .The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with this provision. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

In *Minneapolis and St. Louis Railroad Company v. Bombolis*, 241 U. S. 211 (1916), the railroad on appeal raised questions concerning the manner in which the plaintiff obtained a verdict in the state court in Minnesota. By the Constitution and laws of Minnesota in civil cases, after a case has been under submission to the jury for a period of twelve hours without a unanimous verdict, five-sixths of the

jury are authorized to reach a verdict which is entitled to the legal effect of a unanimous verdict at common law.

Upholding the procedure followed by the Minnesota state court in reaching a verdict, the U. S. Supreme Court rejected the railroad's contention that the state court in enforcing a federal right under F.E.L.A. was required to comply with the 7th Amendment to the U. S. Constitution and require the jury to reach a unanimous verdict. The Supreme Court concluded that in thisinstance, the Minnesota state court could properly follow its own procedure in reaching a jury verdict.

However, in *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U. S. 359 (1952), the U. S. Supreme Court took what appears to be a directly contrary view to its position in *Bombolis*. Dice, a railroad fireman, was seriously injured when an engine in which he was riding jumped a track. When he filed suit in the Ohio state court, the railroad asserted as an additional defense that Dice had executed a release whereby he released the railroad from all claims for the sum of $924.63.

Following a trial before a jury, a verdict and judgment was rendered in favor of Dice. The trial court then granted judgment notwithstanding the verdict. This judgment was reversed by the Ohio Court of Appeals but the Ohio Supreme Court reversed the Ohio Court of Appeals and sustained the trial court's action. The Supreme Court of Ohio concluded that the issue whether there was fraud in the execution of the release was equitable in nature and therefore was properly decided by the judge rather than by the jury.

On appeal to the U. S. Supreme Court, the decision of the Supreme Court of Ohio was reversed. The U. S. Supreme Court concluded that Dice, in asserting his F.E.L.A. claim, was entitled to a jury trial on the issue whether the release was obtained from him by fraud as well as the other issues. The U. S. Supreme Court stated:

> We have previously held that 'the right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" ' and that is 'part and parcel of

> the remedy afforded railroad workers under the Employer's Liability Act.' *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L.Ed. 1444. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. *Brown v. Western R. Co.* 338 U. S. 294, 70 S. Ct. 105, 94 L.Ed. 100.

The dissenting opinion in *Dice* pointed out that Ohio was merely following the general rule that actions which are equitable in nature do not carry with them the right to jury trial. In Ohio, as in Alabama, an action seeking to cancel or reform a written instrument obtained by fraud is equitable in nature and does not carry with it the right to a jury trial.

The majority opinion, however, concluded that the right to jury trial was a substantive right and therefore governed by federal law in claims asserted under F.E.L.A.

In the present case, Burlington and Kershaw argue that *Dice* is not applicable because that case involved the cancellation of a release obtained by fraud while Nettie Faye Warren in the present case seeks to vacate a consent judgment as being obtained by fraud. In the letter brief filed by counsel for Burlington the following statement is found:

> The conclusion of the majority in *Dice* that a jury trial is to be protected is in the context where access to the courts has not been obtained. In that sense the release agreement is a self-help mechanism. Unlike the release situation, the plaintiff in this case has availed herself of the courts. The fact that she elected to effect a consent judgment and not to invoke a jury does not mean that a right has been denied. By coming to the court, the plaintiff has invoked certain other protections available. She has received the benefit of judicial approval. . .

The consent judgment entered by the Circuit Court of Walker County, Alabama did not represent the culmination of litigation or of a lawsuit previously filed by Nettie Faye Warren. According to the testimony of Nettie Faye Warren and also of the Burlington employee, William E. Bird, she was told that $150,000 was all she would get and she agreed to accept that amount plus the $1,500 advance in settlement of her claims. Nettie Faye then went to the office of the Burlington attorney with William Bird. Burlington's attorney prepared the complaint to be signed by Nettie Faye Warren and explained to her that Burlington and Kershaw were accepting service of the same. Nettie Faye then went to the judge's chambers accompanied by Burlington's attorney and William Bird.

According to Bird's testimony, the proceedings before the Circuit Judge involved the following:

> He asked her, I think the first question he asked Mrs. Duckworth was how much education she had; and she told him. He asked her if she had talked to an attorney, and she told him that no, she had not.
>
> He asked her if she had discussed it with members of her family. She said, 'yes.' He asked her if she understood that in signing this, if she was aware that this was a full and final settlement for any and all claims related to that; and she said, 'yes,' she did. He asked her if she was satisfied with that, and she said that she was. That was basically the conversation that took place.

It is true that a final judgment rendered by a court of competent jurisdiction stands on a different footing than a release. This is true even though the judgment is a consent judgment. *Myers v. Myers*, 266 Ky. 831, 100 S.W. 2d 693 (1936); *Marietta Chair Co. v. Henderson*, 49 S.E. 312 (Ga. 1904); *Sawyer v. Smith*, 552 S.W. 2d 936 (Ct. of Civ. App. of Tex. 1977); *Irvine Toll Bridge Co. v. Williams*, 3 S.W. 2d 193 (Ky. Ct. of App 1928); *Wood Brothers Construction Co. v. Yankton County*, 54 F.2d 304 (8th Cir. 1931).

In *Marietta Chair Co. v. Henderson*, supra, the Supreme Court of Georgia stated:

> . . .Parties are, of course, bound by judgments rendered by courts of competent jurisdiction to which they have submitted their controversies, and the judgments bind them whether they expressly agree to them or not, and an express agreement that a particular judgment should be rendered gives to that judgment no peculiar character, and renders it no more sacred that the ordinary judgment. While a judgment is a contract of record, the agreement which the law implies from such a contract is simply that the parties will stand to and abide what has been decreed in the case upon the law and the facts then involved, or which could have been properly involved. . .

Acknowledging that a judgment was entered, Nettie Faye Warren now attacks the judgment as having been obtained by fraud and seeks its cancellation. She has the right under the laws of the state of Alabama to make a direct attack upon the judgment in an independent proceedings as she has done in this case. However, because her claim is asserted under F.E.L.A., she also has the right as a claimant under F.E.L.A. to demand a jury for the trial of the issues related to the question whether the consent judgment was obtained by fraud.

In both *Dice* and the present case, the F.E.L.A. claimant has asserted a claim which is equitable in nature; in *Dice*, the plaintiff was seeking to cancel a release as having been secured by fraud. In the present case, the F.E.L.A. claimant is seeking to cancel a consent judgment as having been obtained by fraud. In both cases, the claimant would not be entitled to a jury trial under state law to decide such issues. However, under *Dice*, the F.E.L.A. claimant is guaranteed the trial by jury for such issues as a substantive right. Under *Dice*, Nettie Faye Warren is entitled to a jury trial on the issue whether the consent judgment was obtained by fraud.

In accordance with this opinion, the motions filed by

Burlington and Kershaw to strike the demand for jury are hereby overruled.

C. Motion by Kershaw to dismiss or in the alternative for summary judgment.

In support of its motion for summary judgment, Kershaw argues that the consent judgment entered by the Circuit Court of Walker County, Alabama on January 2, 1980 has the legal effect of finally resolving all claims for damages against Kershaw by the dependent widow and children of James B. Duckworth, deceased and also all claims by the estate of James B. Duckworth, deceased, against Kershaw for damages based on the accident resulting in James P. Kershaw's death.

According to Kershaw, the final judgment is valid and not subject to cancellation as to Kershaw because the undisputed evidence indicates that Kershaw did not participate in or have knowledge of any alleged fraudulent conduct on the part of Burlington's employees which is the basis for Nettie Faye Warren's attack on the judgment rendered by the Circuit Court of Walker County.

Reviewing the deposition of Nettie Faye Warren, she testified as follows concerning Kershaw:

> Q. Now, did you at any time have any dealings with any one from Kershaw Manufacturing Company?
>
> A. No, sir. You are the first person I have met or even heard of being with that company.
>
> Q. Alright. Did Mr. Bird at any time tell you that he was representing Kershaw in any capacity?
>
> A. The only thing he mentioned about Kershaw is that they made the machine.
>
> * * *
>
> Q. Did I understand you correctly when you told me that the first knowledge you had that Kershaw had contributed any monies towards the settlement was after you got home and you read it?
>
> A. I read that about money. Now, he had mentioned

Kershaw's name when we talked about the machine that my husband had got hurt on.

* * *

Q. I have just got a question or two. Mrs. Warren, you said that you believe that I am the first person that you have seen representing Kershaw?

A. Yes.

Q. And that you understand that Mr. Bird was not representing Kershaw but was representing the railroad; is that correct?

A. Yes.

Q. What is it that you allege that Kershaw did wrong to mislead you in any way?

A. I can't — okay. The $40,000, is that what ya'll paid? Yes.

Okay. The Kershaw Manufacturing Company to me was just a name that had made the machinery.

* * *

Q. (By Mr. Martin) As I understand it then, neither Kershaw nor anyone acting on Kershaw's behalf has ever made any representation whatsoever to you; is that correct?

Mr. Burge: As far as you know.

A. As far as I know.

Nettie Faye Warren acknowledged in her testimony that no representations were made to her by anyone purporting to act on behalf of Kershaw. She did not learn that Kershaw was involved in the settlement until she read the papers including the final judgment when she arrived home after the settlement had been made.

In his deposition, William E. Bird testified as follows:

Now, who did you deal with, if you dealt with anyone, that had any connection with Kershaw Manufacturing Company, I-n-c.?

A. I didn't deal with Kershaw at all.

* * *

Q. Who told you that Kershaw was going to pay $40,000 toward a settlement?

A. That came from the general claims office after Mrs. Duckworth and I arrived at an agreement, and I was told that there was a contribution from them.

Q. You had reached the agreement based on $151,000. After that is when you learned that Kershaw was making some kind of contribution?

A. Yes sir.

Q. So at the time that you made the agreement with Mrs. Duckworth Warren you did not know that Kershaw was making any contribution?

A. No sir. . .

Bird testified that he had no discussions with anyone at Kershaw concerning the settlement; that he received no instructions or directions from anyone at Kershaw regarding the settlement and that at all times he was acting strictly as a representative for Burlington. He further testified that he did not at anytime represent to Nettie Faye Warren that he was acting on behalf of Kershaw.

The settlement of Nettie Faye Warren's claims against Kershaw is treated as a separate settlement in the consent judgment which awards Nettie Faye Warren the sum of $40,000 against Kershaw.

No evidence has been presented to indicate that Kershaw itself was guilty of any fraudulent conduct or that it knowingly participated or assented to any fraudulent conduct on the part of Burlington.

In *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448 (3rd Cir. 1961), Taxin asserted claims for violation of the Anti-Trust Laws against two groups of defendants, one associated with Food Fair Stores, Inc., and the second group associated with Samuel P. Mandell Co., Inc. As one of the defenses, both groups of defendants pleaded that the Taxins had executed a general release releasing them all from all claims under the anti-trust laws. In response, the Taxins executed affidavits stating that they had been induced to execute the

release instrument by a promise made in bad faith by the Food Fair Stores, Inc. defendants that Food Fair Stores would buy $500,000 worth of fruit and produce from them annually. The affidavits and allegations filed by the Taxins attacking the release did not charge that the Mandell defendants participated in or even knew of the alleged misrepresentation.

Upholding the summary judgment granted by the trial court in favor of the Mandell defendants, the U. S. Court of Appeals for the 3rd Circuit stated:

> The exculpation of the Mandell defendants was one important basis of the District Court's conclusion that the release was valid as to these parties. In analogous circumstances the Court of Appeals for the 2nd Circuit has suggested that it would be inequitable to deny one anti-trust defendant the benefit of the settlement and release solely because of fraud, unknown to him, on the part of another defendant in connection with such settlement and release. *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 2 Cir. 1960, 278 F.2d 798, 802. This is in accord with the rule of § 477 of the Contracts Restatement which reads as follows:
>
> 'Fraud or material representation by a third person renders a transaction voidable by a party induced thereby to enter into it if the other party thereto'
>
> (a) 'has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction, or'
>
> (b) 'is affected by the fraud or misrepresentation of the law of Agency or of Trust.'

Also see *Hoge v. Hoge*, 1 Watt. (Penn.) 163 (1832).

Kershaw has changed its position materially by reason of the release, having paid the sum of $40,000 to Nettie Faye Duckworth, as consideration for the discharge of its liability. No evidence has been presented that Kershaw participated in the negotiations with Nettie Faye Warren leading to the settlement of her claims or that Kershaw knew or had notice

of facts from which it should have known by the exercise of reasonable diligence that the settlement of Nettie Faye Warren's claim against it had been obtained by fraud.

It would be inequitable to deny Kershaw the benefit of the settlement and release solely because of fraud, unknown to it, on the part of Burlington.

Accordingly, the Motion for Summary Judgment filed by Kershaw Manufacturing Company, Inc. is hereby granted. Judgment is hereby rendered in favor of Kershaw Manufacturing Company, Inc. and against the plaintiffs.

6. *Discovery.* The parties are given leave to proceed with further discovery provided it be completed at least twenty (20) days prior to the trial.

At least twenty (20) days prior to the trial, each of the parties to this litigation shall furnish and make available to each of the other parties, for inspection and copying, all documents, bills, reports, photographs and other exhibits which each such party intends to utilize at trial. Unless otherwise specifically agreed between the parties, each shall be precluded from offering any exhibits not so provided to each of the other parties (other than purely for impeachment purposes) unless relieved by the Court for good cause shown. Upon such documents being exhibits to the parties herein or counsel for each such party, each of the parties shall be deemed to have agreed that such documents and exhibits are authentic and genuine and that any photographs included in said exhibits fairly and accurately portrays the scene therein depicted and that such photographs and copies of such documents may be utilized at trial to the same extent as the originals without accounting for such originals, unless objection is made by a party within seven (7) days after being shown such document or exhibit. In the event that any such objection shall be made, the party making the same shall also state the basis for grounds for such objection. No party may object to the authenticity or genuineness of any document or exhibit on the ground that he has no knowledge of the same unless such party has first exercised

reasonable diligence in his efforts to ascertain and verify the same. Unless a party has given notice to the contrary within seven (7) days after having been shown the same, each party shall also be deemed to have agreed for purposes of this action that any bills for services or materials are reasonable in amount for the services or materials therein billed.

At least twenty (20) days prior to trial, each of the parties shall exchange lists stating the names and addresses of all witnesses which each of the parties intends to use in the trial of this cause. The listing of a witness does not commit the party to have such witness available at trial or to call such witness. In the event any of the witnesses are expert witnesses, the list shall include the substance of the opinion of any expert witness (other than medical experts) as provided in Rule 26. However, each of the parties shall not be required to furnish the names of rebuttal witnesses, the necessity for whose testimony such party could reasonably not have anticipated before the time of trial.

ORDERED this 15th day of June, 1984, that the above provisions be binding on all parties unless modified by further order for good cause shown.

/s/ MARVIN CHERNER

Circuit Judge

Copies to:
Frank O. Burge, Esq.
Scott A. Powell, Esq.
Vastine Stabler, Esq.
Jack J. Hall, Esq.

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

Ex parte: BURLINGTON NORTHERN RAILROAD COMPANY	)	
(In Re: NETTIE FAYE DUCKWORTH WARREN, etc.	)	
v.	)	CASE NO. 83-1159
BURLINGTON NORTHERN RAILROAD COMPANY, etc., et al.	)	

APPLICATION FOR REHEARING

Comes now Burlington Northern Railroad Company (hereinafter "Burlington") and petitions this Court to grant it an application for rehearing. A rehearing is necessary to rectify the omissions and analytical errors of the original opinion.

1. The Court failed to properly apply principles of res judicata in this case. The entry of the judgment extinguished the FELA action; the plaintiff's only remaining remedy was the independent action in equity to set aside the judgment. FELA rules therefore should not have been applied.

2. Burlington's right to equal protection of the law was violated in that it was denied the usual expectations of repose extended to other defendants against whom judgments have been entered.

3. Even if this case is characterized as an FELA claim, the Court has overextended the *Dice* opinion. This Court determined that the import of *Dice* is that all traditionally equitable proceedings incidental to an FELA claim are to be tried by a jury. This is simply incorrect. The holding of *Dice*

is that the federal procedural rule will prevail when it conflicts with a local rule. *Dice* does not require a jury trial when the usual federal rule does not.

4. Assuming *arguendo* that federal law provides for a jury trial to set aside a prior final judgment, it is unconstitutional for this rule to be applied to the state court proceedings. Any effort by Congress to usurp the authority of state court judgments through the FELA is prevented by the constitutional doctrines controlling the relationship between federal and state power, now held to be rooted in the Tenth Amendment. Congress knew this and the United States Supreme Court knew this. Only Alabama has ignored these principals. The failure of this Court to address the 10th amendment issue when four of the nine justices in *Dice* stated that the federal legislature did not even have power to regulate the procedure governing the setting aside of a mere release is adequate grounds for granting this application.

Due to the foregoing reasons, this Court must reconsider its decision and grant the application for rehearing.

Respectfully submitted,

/s/ L. VASTINE STABLER, JR.

/s/ KENNETH D. DAVIS

Attorneys for Burlington
Northern Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Application for Rehearing has been duly served on Mr. Frank O. Burge, Jr., BURGE, FLORIE, POWELL & WETTERMARK, P.C., 1230 First Alabama Bank Building, Birmingham, Alabama 35203-3269, by hand-delivering, this 18th day of January, 1985.

/s/ KENNETH D. DAVIS
OF COUNSEL

APPENDIX H

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-1159
EX PARTE: BURLINGTON NORTHERN RAILROAD COMPANY
PETITION FOR WRIT OF MANDAMUS
(Re: Nettie Faye Duckworth Warren, etc.
Appellant

vs.

Burlington Northern Railroad Co., etc., et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.
____ Court Reporter granted additional time to file reporter's transcript to and including
____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
____ Appell____ granted 7 additional days to file briefs to and including
____ Appellant(s) granted 7 additional days to file reply briefs to and including
____ Record on Appeal filed
____ Appendix Filed
____ Submitted on Briefs
____ Petition for Writ of Certiorari denied. No opinion.
xxxx Application for rehearing overruled. No opinion written on rehearing.
____ Permission to file amicus curiae briefs granted
____

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama

Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HON. MARVIN CHERNER, Judge of the Tenth Judicial Circuit of Alabama,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF OF PETITIONER

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Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF OF PETITIONER

The Brief in Opposition to the Petition for Writ of Certiorari filed on behalf of respondent argues that 45 U.S.C. § 55 was dispositive of the issue raised by the petition. (Respondent's Brief 8-10) Because that issue was not discussed in the original petition, we are compelled to file a reply.

Section 45 is a substantive statute which provides that any "contract, rule or device whatsoever" which exempts a railroad

company from liability under the FELA is void.[1] That section does not refer to jury trial.

The sole question raised in the Petition for Writ of Certiorari involves whether the Federal Employers' Liability Act requires that an attempt to set aside the judgment be decided by a jury. Thus, whether a consent judgment is a device within the meaning of 45 U.S.C. § 55 is of no import.

Respectfully submitted,

L. Vastine Stabler, Jr.
Kenneth D. Davis

Attorneys for Petitioner,
Burlington Northern Railroad
Company

OF COUNSEL:

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[1] This section reads in its entirety as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may be set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.